91-1602

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA SMITH,

Petitioner,

vs.

JAMES FRELAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the fourth amendment, it is permissible, as a matter of law, for a police officer to use deadly force against the driver of a fleeing vehicle who ignores a lawful order to stop and continues to operate his vehicle in a reckless manner, but who does not pose a threat of death or serious harm to the officer.

2. Whether evidence that, in using deadly force against the driver of a fleeing vehicle, a police officer has violated his department's use-of-force policy embodying the standards adopted by this Court in *Tennessee* v. *Garner* and *Graham* v. *Connor* creates a genuine issue of fact material to the question whether the officer's conduct was objectively reasonable, thereby precluding summary judgment in his favor.

PARTIES

1. Petitioner Patricia Smith, individually and as administratrix of the estate of Brent Robin Smith.
2. Respondent James Freland, Acting Chief of Police for the City of Springdale, Ohio.
3. Respondent Peter Schulcz, III, Police Officer, City of Springdale, Ohio, Police Department.
4. Respondent The City of Springdale, Ohio.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case Nos. 91-3469/3470, App. 1a, is reported at 954 F.2d 343. The opinion of the United States District Court for the Southern District of Ohio, App. 12a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1992. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U.S CONST. amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On October 31, 1988, at 9:22 p.m., Officer Peter Schulcz, who was on patrol in his cruiser in the City of Springdale, Ohio, observed the driver of a "Monte Carlo-type vehicle," later identified as Brent Robin Smith, pull out of an apartment complex parking lot at a high rate of speed and run through a stop sign. A chase ensued for three miles, in the course of which Officer Schulcz pursued Brent Smith through residential neighborhoods at speeds which at some point, according to Officer Schulcz, reached ninety miles per hour. At 9:28 p.m., Officer Schulcz radioed the Hamilton County, Ohio, communications network that he was "in pursuit" of Brent Smith's car. Janice Gordon, an auxiliary officer in the Sharonville, Ohio, police department, heard Officer Schulcz' initial transmission, received permission from her supervisor to follow Officer Schulcz, and proceeded to the location Schulcz had announced. Officer Schulcz continued to radio his position, and Officer Gordon followed at a short distance in her cruiser, monitoring Officer Schulcz's subsequent radio transmissions. At one point in the chase, Officer Gordon attempted to block a street with her cruiser, but Brent Smith purposely drove around it, driving onto the berm as he did so. At approximately 9:30 p.m., Officer Schulcz radioed that Brent Smith had "almost [run] myself and a Sharonville cruiser off the road. He's wanted for attempted assault on law enforcement officers."

At approximately 9:31 p.m., Officer Schulcz radioed that he had followed Brent Smith off of Centerdale Avenue, in Sharonville, Ohio, and onto Woodbine Avenue, a dead-end street approximately 309 feet in length. Officer Schulcz followed Brent Smith to the end of Woodbine Avenue. When Brent Smith reached the end of Woodbine Avenue, he drove into a resident's yard to turn around. Officer Schulcz pulled the nose of his cruiser up to the driver's door of Brent Smith's car, in order to prevent Mr. Smith from opening it and fleeing on foot. Brent Smith backed up and Officer Schulcz followed suit. Officer Schulcz's cruiser came to rest nose-to-

nose with Brent Smith's car, which was then boxed in at the end of Woodbine Avenue.

Officer Schulcz then exited his cruiser in order to approach Mr. Smith. As he did so, Brent Smith began to maneuver his car past the cruiser, in an attempt to get away. Officer Schulcz walked around the back of his cruiser as Brent Smith's car pulled around the front of the cruiser. Officer Schulcz then drew his weapon for the first time, and took two or three steps to the right of his cruiser in an attempt to follow Brent Smith's car down Woodbine Avenue. As Brent Smith's car was passing by him, Officer Schulcz assumed a steady firing stance, aimed, and fired one shot toward the rear portion of the passenger's side of the car. The bullet entered Brent Smith's car from behind his body, traveling through the right seat back and crossing the interior of the vehicle before striking Brent Smith. At the time he fired the shot, Officer Schulcz was approximately seven to ten feet away from Brent Smith's car and in no immediate danger from that car, which was then passing away from him. The bullet pierced Brent Smith's right lung, liver, diaphragm, and the posterior wall of the right ventricle, exiting the pericardium, bruising the left lung and fracturing the left sixth rib.

After the shot was fired, Brent Smith's car travelled some distance up Woodbine Avenue, and then came to a stop before reaching Centerdale Avenue. A police roadblock had been set up at the end of Woodbine Avenue, blocking egress from Woodbine Avenue to Centerdale Avenue. This roadblock was clearly visible from the opposite end of Woodbine Avenue. Officer Janice Gordon, who had followed Officer Schulcz to Woodbine Avenue in her cruiser, pulled up to the intersection of Centerdale and Woodbine Avenues just as Brent Smith's car was moving up Woodbine Avenue toward Centerdale Avenue and, having seen the cruiser and Brent Smith's car at the end of the street, used her cruiser to block any egress from Woodbine Avenue. At approximately 9:32 p.m., after a brief conversation with Officer Schulcz (who had followed Brent Smith's car up Woodbine Avenue on

foot), Officer Gordon called for a life squad. Several other Sharonville police cars arrived once Officer Gordon had called the life squad. Brent Smith was removed from his car by Sharonville officers, and ultimately transported to a hospital, where he was pronounced dead on arrival. The total time elapsed between Officer Schulcz's initial report that he was pursuing Brent Smith and the time Officer Gordon called the life squad was approximately four minutes. The total time elapsed between Officer Schulcz's transmission that he and Brent Smith were on Woodbine Avenue and the time the life squad was called was approximately sixty-seven seconds.

At the time of the events described above, there was in force a City of Springdale Police Department policy governing the use of force and discharge of firearms by police officers ("General Order 46"). App. 20a. General Order 46 provides, in relevant part, that police officers are "authorized to use that force reasonably necessary to protect [themselves] or others from loss of life or great bodily harm at the hands of another." *Id.* General Order 46 further provides that "NO SHOTS [sic] will be fired . . . at fleeing vehicles, unless the situation becomes one of self-defense, and that "[i]f the suspect is using a motor vehicle as a means of escape, [an] officer may not fire his revolver at the vehicle." App. 24a. Where an officer attempts to arrest a suspected misdemeanant, General Order 46 absolutely prohibits the firing of shots even if the suspect attempts to escape or ultimately succeeds in escaping. App. 23a.

On August 30, 1989, Petitioner Patricia Smith, individually and as Administratrix of the Estate of her son, Brent Smith, filed a complaint in the district court pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 seeking compensatory and punitive damages against Respondents the City of Springdale, Ohio ("City"), Acting Springdale Police Chief James Freland and Springdale Police Officer Peter Schulcz III. Petitioner alleged (1) that Officer Schulcz's use of deadly force against Brent Smith was excessive and unreasonable under the fourth amendment; (2) that the City and Chief Freland had in effect

ratified Officer Schulcz's actions by failing to discipline him or take any other form of corrective action despite Officer Schulcz's apparent violation of City policies and procedures governing the use of deadly force against fleeing vehicles; and (3) that by virtue of their actions Respondents had violated Brent Smith's rights under the fourth, eighth and fourteenth amendments to the United States Constitution. Petitioner further alleged that Respondents deprived her of her liberty interest in her familial relationship with her son. The Complaint also set forth state claims under the Ohio wrongful death and survival of actions statutes, Sections 2125.01 and 2305.21 of the Ohio Revised Code.

On December 7, 1990, the City and Chief Freland filed a joint Motion for Summary Judgment on grounds that (1) a single incident of unconstitutional conduct by a municipal employee is insufficient to impose municipal liability upon them under Section 1983, and (2) Chapter 2744 of the Ohio Revised Code provides them immunity from liability with respect to Petitioner's state law claims. On January 1, 1991, Officer Schulcz filed a Motion for Summary Judgment, asserting that he was entitled to qualified immunity under *Tennessee* v. *Garner*, 471 U.S. 1 (1985) and *Anderson* v. *Creighton*, 483 U.S. 635 (1987) on the sole ground that, at the time he shot Brent Smith, he reasonably believed that Brent Smith posed a serious threat to his personal safety. Following oral argument, the district court filed an opinion granting Respondents' motions on May 9, 1991. App. 12a. Construing the evidence before it in the light most favorable to Petitioner, the district court declined to enter summary judgment in Respondents' favor on the grounds that Officer Schulcz reasonably believed his use of deadly force was necessary in self-defense. App. 17a. The district court nevertheless held that although Officer Schulcz "was not in any immediate personal danger at the time he discharged his weapon," no violation of Brent Smith's constitutional rights had occurred. App. 17a, 18a. Officer Schulcz was entitled to employ deadly force in this instance, the district court stated, because "[a] reasonable officer [under the] circumstances, would certainly

believe that if Mr. Smith continued this escape attempt, he posed a significant threat of physical injury to numerous others." App. 18a.

On May 9, 1991, the district court entered judgment dismissing Petitioner's state law claims. On May 14, 1991, the district court entered an amended judgment granting Respondents' motions and dismissing Petitioner's state law claims.[1] Petitioner filed a timely notice of appeal from the amended judgment. On May 20, 1991, the district court entered a second amended judgment granting Respondents' motions and dismissing Petitioner's state law claims. Respondent filed a timely notice of appeal from the second amended judgment. On June 17, 1991, the United States Court of Appeals for the Sixth Circuit consolidated the appeals pursuant to Sixth Circuit Rule 8(b).

On January 6, 1992, the court of appeals entered judgment affirming the district court. App. 1a. Although Officer Schulcz had sought to justify his actions only on self-defense grounds, the court of appeals held, as had the district court, that Officer Schulcz had not violated Brent Smith's constitutional rights. According to the court of appeals, Officer Schulcz's actions were constitutional, as a matter of law, under *Garner* and *Graham* v. *Connor*, 490 U.S. 386 (1989), because a reasonable officer would have concluded that Brent Smith posed a threat of serious injury to officers manning the roadblock at the end of Woodbine Avenue as well as to others. App. 8a. In so holding, the court of appeals declined to consider evidence that in shooting Brent Smith as he attempted to escape, Officer Schulcz had violated General Order 46. App. 9a. The court of appeals held that it was not obligated to consider this evidence, because policies such as General Order 46 do not set the constitutional standard of reasonableness under the fourth amendment. *Id.*

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[1] Since the district court held that Officer Schulcz had not violated Brent Smith's constitutional rights, it did not reach the immunity issues raised in the City and Chief Freland's motion.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. **The court of appeals has created an exception to *Garner v. Tennessee* permitting *per se* use of deadly force by a police officer to apprehend the driver of a fleeing vehicle who, while posing no immediate threat of harm to the officer, ignores a lawful order to stop and continues to operate the vehicle in a reckless manner.**

This case involves the seizure by deadly force of an individual who fled from police in an automobile and who was suspected solely of dangerous driving. It is a case of first impression in this Court. Despite this Court's requirement that the constitutionality of seizures by means of deadly force be judged in light of the totality of the circumstances and on a case by case basis, the court of appeals has approved a *per se* rule authorizing a police officer's use of deadly force to apprehend a fleeing motorist suspected of violating traffic laws, where the motorist poses no immediate threat to the officer's safety and where the officer himself offers no reason other than self-defense for his actions. The court of appeals has diluted the constitutional protections this Court has afforded citizens against the unreasonable use of deadly force by police. It has, in effect, authorized the *per se* use of deadly force to apprehend individuals who use an automobile to flee from the police and who are suspected solely of reckless driving. This Court must review and reverse the decision of the court of appeals in order to reinforce the fundamental principles underlying *Garner* v. *Tennessee*, in which this Court eschewed the use of *per se* rules in judging the constitutionality of the use of deadly force against fleeing suspects, and *Graham* v. *Connor*, in which this Court mandated that the constitutionality of *all* seizures be analyzed in terms of the totality of the circumstances. The court of appeals' decision establishes a "fleeing vehicles" exception to *Garner* and *Graham*. This exception is unwarranted and this Court must not permit it to stand.

The principles controlling this case govern, *a fortiori*, the issue whether the factual disputes in the record are material and hence preclude summary judgment in favor of Respondents. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In *Graham* v. *Connor*, this Court held that all claims of excessive force in the course of the seizure of a free citizen — whether investigatory stop or arrest — brought pursuant to 42 U.S.C. § 1983 are properly analyzed under the fourth amendment's reasonableness requirement. 490 U.S. 386, 394 (1989). This analysis requires that "the nature and quality of the intrusion on [a suspect's] fourth amendment interests" be balanced "against the countervailing governmental interests at stake." *Id.* (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)). This standard requires a finding of objective "reasonableness *at the moment* [the challenged police conduct occurs]." *Id.* (emphasis added). This reasonableness inquiry is fact-specific, and must take into account "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the [officer] or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Garner*, 471 U.S. at 8-9). This Court has stated that a policeman's use of deadly force in an attempt to prevent a suspect's escape is constitutional only where such force is "necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee* v. *Garner*, 471 U.S. 1, 3, 11 (1985) (holding unconstitutional a state statute authorizing the use of deadly force against fleeing suspected felons, as applied to "unarmed, nondangerous" suspects). Where an officer has used deadly force to effectuate the seizure of a suspect, the balancing of interests required by the fourth amendment must be undertaken with sensitivity to the obvious severity of the intrusion upon a suspect's fourth amendment interests which the use of deadly force represents. As this court has stated, "[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamen-

tal interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in *judicial* determination of guilty and punishment." *Id.* at 9 (emphasis added).

This Court had described the relative burdens of the parties once a properly documented motion for summary judgment is made as follows: On a motion for summary judgment, the moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a general issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986) (quoting Federal Rule of Civil Procedure 56 (c)). The burden then shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Federal Rule of Civil Procedure 56(e)). A grant of summary judgment must be reversed unless it is plain, upon review of all materials properly submitted to the court under Federal Rule of Civil Procedure 56(c), that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. On summary judgment, the only question for the Court is whether there exists a genuine issue of material fact for trial. *Id.* at 249. In its review of the record on summary judgment, the Court may not weigh the evidence. *Id.* The standard governing a motion for summary judgment mirrors the standard for a directed verdict. *Id.* at 250. Therefore, a grant of summary judgment is proper only if, as a matter of law, and viewing all evidence in the record in the light most favorable to the party opposing the motion, no jury could decide in that party's favor. *See id.*

To understand the import of the court of appeals' decision in the instant case for police practices throughout this country, it is critical that this Court examine the precise scenario depicted by the evidence presented to the court of appeals on

summary judgment, viewed in the light most favorable to Petitioner and in light of the parties' respective evidentiary burdens at this stage of the proceedings. While on routine patrol, Officer Peter Schulcz saw Brent Smith commit a traffic violation (speeding through a stop sign). There ensued a high speed chase during which Brent Smith drove recklessly and at speeds in excess of the legal limit. There is absolutely no evidence in this record that Brent Smith was armed or suspected of being armed. The evidence is inconclusive as to whether, in fact, Brent Smith assaulted or even attempted to assault any police officer during the chase that eventually ended on Woodbine Avenue. The court of appeals implicitly recognized as much, when it stated that although Brent Smith's car swerved toward Officer Schulcz's vehicle, "Officer Schulcz allowed Mr. Smith to get in front of him, *but* told the county dispatcher that Mr. Smith was now wanted for assault on a police officer." App. 2a (emphasis added). While the fact that Officer Schulcz made such a report is undisputed, there are insufficient facts in the record from which a jury could only conclude that Brent Smith had indeed assaulted or attempted to assault Officer Schulcz with his vehicle. Similarly, as the court of appeals recognized, the uncontroverted facts demonstrate that, far from attempting to assault Officer Gordon when she placed her vehicle in Mr. Smith's path prior to their arrival at Woodbine Avenue, Brent Smith drove around her, with Officer Schulcz following behind him. *Id.*

As both the district court and the court of appeals found, App. 17a, 6a, there exists a genuine factual dispute as to whether Brent Smith used his vehicle as a deadly weapon against Officer Schulcz at the end of Woodbine Avenue. The question whether Officer Schulcz reasonably shot Brent Smith in self-defense remains a jury question. Therefore, Brent Smith must be viewed as attempting to escape from Officer Schulcz, and not attempting to assault him. The evidence demonstrates, and the court of appeals assumed, that a police roadblock was in place at the end of Woodbine Avenue as Officer Schulcz fired upon Brent Smith. App. 8a.

Finally, the facts demonstrate that as Brent Smith proceeded past Officer Schulcz toward the end of Woodbine Avenue, Officer Schulcz took steady aim at him and fired one shot directly into his car.

On these facts, the court of appeals concluded that no jury could find Officer Schulcz's use of deadly force to be unreasonable. App. 8a. The court of appeals' reasoning is as follows:

> In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably. Even if there were a roadblock at the end of Woodbine Avenue, Officer Schulcz could reasonably believe that Mr. Smith could escape the roadblock, as he had escaped several times previously. In any event, Mr. Smith had freed his car from Officer Schulcz's attempted blockade, and was undoubtedly going to escape from Officer Schulcz, if not the entire police force. Had he proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon. . . . Finally, rather than confronting the roadblock, he could have stopped his car and entered one of the neighboring houses, hoping to take hostages. Mr. Smith had proven he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others.

App. 8a-9a (citation omitted). There is simply no basis in the record for the court of appeals' conclusion that Brent Smith threatened the safety of officers at the roadblock, as a matter of law. Furthermore, on this record, it cannot be said that, as a matter of law, Brent Smith posed a risk of serious harm to "others," in the abstract, when Officer Schulcz shot him. Although a car *can* be a deadly weapon, there is a genuine factual dispute as to whether Brent Smith at any time during

the events in question used *his* car as a deadly weapon. Indeed, since the undisputed facts demonstrate that Brent Smith had driven around an earlier roadblock, those facts do not support a conclusion that Brent Smith posed a "major threat" to the officers manning the roadblock at the end of Woodbine Avenue. Furthermore, there are absolutely no facts in this record to support the court of appeals' cynical and speculative assertion that Brent Smith "could have" entered one of the homes on Woodbine Avenue to take hostages in order to effectuate his escape. App. 8a-9a. At worst, the evidence demonstrates that Brent Smith was driving recklessly. Respondents have never suggested, let alone documented by way of proper summary judgment materials, that Brent Smith posed a threat to anyone other than Officer Schulcz by virture of his operation of his vehicle. The court of appeals' speculation is impermissible under both *Graham* and *Garner*, which require a case by case analysis of the facts and circumstances actually confronting an officer at the time he employs deadly force.

The message of the court of appeals' decision is clear: a police officer may, consistent with the fourth amendment, take deadly aim at the driver of a fleeing vehicle suspected merely of reckless driving in order to effectuate the driver's apprehension, in spite of the presence of a police roadblock designed precisely to prevent further illegal operation of the vehicle. Rather than encourage police to accept the risk that a roadblock will not always impede a traffic violator, the court of appeals has sanctioned the impulse to use deadly force at any cost, including the loss of the suspect's life, where police have no reason to believe the suspect has committed any crime other than reckless operation of his vehicle. This rule flies directly in the face of *Garner*, wherein this Court held unconstitutional any *per se* rule authorizing the use of deadly force to apprehend fleeing suspects. The court of appeals struck an improper balance between the government interests at stake in this case, i.e., the apprehension of a reckless driver, and Brent Smith's "fundamental" fourth amendment interest in his own life. *Garner*, 479 U.S. at 9.

Among the factors the court must consider in arriving at a proper balance of interests is "the severity of the crime at issue." *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). At minimum, there is a genuine factual dispute in this case as to whether Brent Smith had committed any crime other than reckless driving. The court of appeals completely ignored this aspect of the *Garner/Graham* analysis. Furthermore, whether a fleeing suspect "poses a significant threat of death or serious physical injury to the officer or others," *Garner*, 471 U.S. at 3, depends largely upon the severity of the crime of which he is suspected. The court of appeals simply failed to address this aspect of the *Garner/Graham* calculus in holding that Officer Schulcz did not violate Brent Smith's fourth amendment rights.

It is undisputed that the events leading to Brent Smith's death took place within a matter of minutes. The court of appeals therefore gave "great weight" to this Court's admonition in *Graham* that in judging the constitutionality of a police officer's use of deadly force courts take into account whether the officer was faced with the need to make a split-second decision to use such force. App. 7a (quoting *Graham*, 490 U.S. at 396-97)). While the rapid pace of developing events is a *factor* to be considered in determining the objective reasonableness under the fourth amendment of a police officer's use of deadly force, it cannot be dispositive of that determination where the totality of the facts demonstrates that the officer's conduct was otherwise *unreasonable*. *See Ford* v. *Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988) (en banc). Were this not the case, every challenged use of deadly force by police under "rapidly evolving" circumstances, *Graham*, 490 U.S. at 397, would pass constitutional muster, and the need for the *Graham/Garner* analysis in such situations would be obviated. In the instant case, the totality of the circumstances facing Officer Schulcz, including the seriousness of the crime of which Brent Smith was suspected, preclude a determination that, as a matter of law, Officer Schulcz acted reasonably, despite the brevity of the time in

which he acted. Indeed, the evidence demonstrates that Officer Schulcz had sufficient time before firing his weapon to assume a stable firing position and to track Brent Smith as he drove past him. On this record, therefore, the length of time involved cannot be dispositive of the instant motions for summary judgment. To hold otherwise is to sanction the automatic use of deadly force by police against drivers of fleeing vehicles regardless of the severity of their crimes, based on a presumption that their driving by definition, and as a matter of law, constitutes an immediate risk of serious injury or death to others.

2. Evidence that, in using deadly force against the driver of a fleeing vehicle, a police officer has violated his department's use-of-force policy embodying the standards adopted by this Court in *Tennessee v. Garner* and *Graham v. Connor* creates a genuine issue of fact material to the question whether the officer's conduct was objectively reasonable, thereby precluding summary judgment in his favor.

The court of appeals held that "the fact that Officer Schulcz's action may have violated [the City of] Springdale's policies regarding police use of force" did not require reversal of the district court's judgment that Officer Schulcz had acted reasonably in shooting Brent Smith. App. 9a. Reasoning that "city policies do not determine constitutional law," the court of appeals declined to consider Officer Schulcz's conduct in light of General Order 46 in ruling on the merits of Petitioner's appeal. *Id.* (citing *Ford* v. *Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc)). By rejecting evidence that bears materially on the reasonableness of Officer Schulcz's conduct, the court of appeals undercuts the *Garner* requirement that analysis of the use of deadly force take into account the totality of the circumstances. In addition, the court of appeals discourages the formulation of police policies emulating the *Garner/Graham* objective reasonableness standard,

and discourages the enforcement of such policies. For if the objective reasonableness of a police officer's use of deadly force to effectuate seizure of a fleeing suspect is to be judged without reference to whether or not that officer has violated a departmental policy mandating a reasoned use of deadly force, there is no incentive for an officer to act within the dictates of that policy. The court of appeals' argument also misconstrues the evidentiary purpose and value of municipal policies governing the use of deadly force by police in fourth amendment "seizure" cases, and misconstrues the value of the evidence indicating that Officer Schulcz violated General Order 46 for determining whether the *Garner/Graham* standard of objective reasonableness has been satisfied, as a matter of law, in this case. General Order 46 embodies the *Garner* standard for determining when the use of deadly force is "objectively reasonable." Section VII of that Order provides, in pertinent part, that

> NO SHOTS (sic) will be fired . . . at fleeing vehicles, unless the situation becomes one of self-defense.
>
> A. If the suspect is using a motor vehicle as a means of escape, the officer may not fire his revolver at the vehicle.
>
> B. Only when the suspect ceases using the vehilce as a means of transportation and begins using it as a deadly weapon may an officer use his firearm to stop the attack.

App. 24a. The Order flatly prohibits the firing of weapons at a suspected misdemeanant to prevent his escape. General Order 46, Section V, App. 23a. Based upon the evidence properly before it on Respondents' motions for summary judgment, the district court declined to grant those motions on grounds that Officer Schulcz was personally in danger at the time he shot Brent Smith and, therefore, that his actions were objectively reasonable because undertaken in self-defense. App. 17a. The same evidence fails to demonstrate, as

a matter of law, that Brent Smith was using his vehicle as a deadly weapon against others. Rather, the evidence indicates that Brent Smith was using his vehicle to escape from Officer Schulcz. Under these circumstances, therefore, Officer Schulcz was not authorized by Order 46 to fire upon Brent Smith.

Contrary to the court of appeals' assumption, the issue presented in this case is not whether an internal police department policy should supplant the *Graham/Garner* standard for determining the "objective reasonableness" of a police officer's conduct. The issue is, rather, whether evidence that a police officer has violated a use-of-force policy, such as General Order 46, that delineates the circumstances in which a municipality has determined deadly force cannot be employed, requires that a jury decide whether the officer's use of deadly force is nevertheless consistent with the fourth amendment. The *Garner/Graham* inquiry requires the application of objective standards to measure the reasonableness of an officer's use of deadly force, in light of the facts and circumstances facing the officer when he or she employed such force to effectuate the seizure of a suspect. *Graham*, 490 U.S. at 397. Police policies such as General Order 46 are such objective standards. They define the circumstances that, in the judgment of a municipality charged with the responsibility to train and supervise police officers, justify an officer's use of deadly force against suspects who flee from the police in vehicles. They are, therefore, objective evidence against which the constitutionality of a challenged use of deadly force must be measured, in light of the circumstances.

In the instant case, there exists a factual issue as to whether Officer Schulcz violated General Order 46. Therefore, there exists a genuine issue whether a reasonable officer, with knowledge of the dictates of General Order 46, would have had grounds consistent with the fourth amendment for taking Brent Smith's life in order to seize him. Such evidence precludes a determination that, as a matter of law, Officer

Schulcz acted reasonably under the circumstances. The *weight* to be attributed to the content of General Order 46, and to the evidence that Officer Schulcz's conduct violated that Order, must be determined by a jury, and not by a court on summary judgment.

CONCLUSION

For all the foregoing reasons, Petitioner Patricia Smith urges this Court to grant her Petition and set this case for briefing and argument or, in the alternative, to grant her Petition, enter a summary reversal, and remand this case for further proceedings.

Respectfully submitted

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APPENDIX

RECOMMENED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3469/3470

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA SMITH, Individually and as Administratrix of the Estate of Brent Robin Smith,
Plaintiff-Appellant,

v.

JAMES FRELAND; PETER SCHULCZ; and the CITY OF SPRINGDALE, OHIO,
Defendants-Appelles.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed January 6, 1992

Before: BOGGS and SUHRHEINRICH, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

BOGGS, Circuit Judge. Patricia Smith appeals the district court's grant of summary judgment for the defendants in this action, based on 42 U.S.C. § 1983. The case concerns the death of her son, who was shot by a policeman while fleeing in his car after a high-speed chase. She contends that the shooting was an unreasonable seizure violating his fourth

amendment rights. Because the district court did not err in holding that the seizure was not unreasonable as a matter of law, we affirm the judgment of the district court.

I

The following facts are essentially undisputed. At approximately 9:28 p.m. on October 31, 1988, Officer Peter Schulcz of the Springdale police department saw a "Monte-Carlo-type vehicle" come speeding out of an apartment complex. The car, driven by Brent Robin Smith, ran a stop sign, and Officer Schulcz gave pursuit. Rather than pulling over, Mr. Smith tried to escape, and led Officer Schulcz on a wild chase at speeds in excess of ninety miles per hour. At one point, Mr. Smith backed up in a field at the edge of an asphalt roadway. His car was spinning its tires and throwing up grass and dirt, and Officer Schulcz assumed that he was stuck and began to pull his police cruiser in front of Mr. Smith's car. Suddenly, Mr. Smith's car leaped forward and swerved toward Officer Schulcz's car. Officer Schulcz pulled his car to the right to avoid a collision and again tried to position himself in front of Mr. Smith. However, Mr. Smith once more swerved toward the police cruiser. Officer Schulcz allowed Mr. Smith to get in front of him, but told the county dispatcher that Mr. Smith was now wanted for assault on a police officer.

By this time, the cars had left Springdale and entered Sharonville, another Cincinnati suburb in the northern part of Hamilton County, Ohio. Janice Gordon, a Sharonville police officer, had heard Officer Schulcz's description of the chase. She placed her car in Mr. Smith's path, attempting to block him. However, she had left room for him to maneuver around her, and he did so, driving past at high speed with Officer Schulcz still in pursuit.

After fleeing Officer Schulcz for approximately 2.6 miles, Mr. Smith pulled onto Woodbine Avenue in Sharonville, a dead-end residential street approximately fifteen to twenty feet wide. At the end of the street, Mr. Smith tried to turn his

car around in a lawn. Officer Schulcz, attempting to prevent Mr. Smith from escaping, placed his car as close to Mr. Smith's as possible. Eventually, the cars came nose to nose. A building associated with a local swimming pool was behind Mr. Smith's car, and a fence with a gate was on Mr. Smith's left. Officer Schulcz then got out of his car and moved around its rear, intending to remove Mr. Smith from his car.

Suddenly, Mr. Smith backed up his car, then sped forward and crashed into Officer Schulcz's car. He backed up again and zoomed around the police car, smashing into the fence and gate as he did so. As Mr. Smith's car drove past, Officer Schulcz pulled his gun and fired one shot at it. The bullet entered the passenger side of the car, pierced the passenger seat, then struck Mr. Smith in his right side, killing him. The entire incident, beginning with Officer Schulcz's first sighting of Mr. Smith, lasted about four minutes. The parties were on Woodbine Avenue for approximately sixty-seven seconds.

On August 30, 1989, Patricia Smith, individually and as administratrix of the estate of her son, Mr. Smith, filed a complaint in the Southern District of Ohio. She sought punitive and compensatory damages, and alleged violations of 42 U.S.C. § 1983 by Officer Schulcz, Acting Springdale Police Chief James Freland, and the City of Springdale. Specifically, she claimed that (1) Officer Schulcz's use of deadly force was excessive and unreasonable; (2) Springdale and Chief Freland had in effect ratified Officer Schulcz's actions by failing to discipline him or take any corrective action with regard to their policies and procedures; and (3) by their actions the defendants had violated Mr. Smith's rights under the fourth, eighth, and fourteenth amendments. She also claimed that they had deprived her of her liberty interest in her relationship with her son. Finally, the complaint alleged state claims under the Ohio wrongful death and survival of actions statutes. Ohio Rev. Code Ann. §§ 2125.01, 2305.21.

On December 7, 1990, Springdale and Chief Freland filed a joint motion for summary judgment. They claimed that a single incident of unconstitutional conduct by a municipal employee is insufficient to impose municipal liability upon

them under § 1983, and that state law makes them immune from liability with respect to state law claims. Officer Schulcz subsequently filed a motion for summary judgment, claiming that he should receive qualified immunity because he reasonably believed that Mr. Smith represented a major threat to his safety. On May 9, 1991, the district court held that Officer Schulcz had not deprived Mr. Smith of his constitutional rights, and granted his motion for summary judgment. Since it concluded that Mr. Smith had not suffered any constitutional deprivation, it also dismissed the claims against Springdale and Chief Freland. Having dismissed the federal claims, it concluded that it no longer had jurisdiction over Ms. Smith's state claims. This timely appeal followed.

II

In reviewing grants of summary judgment, we use the same test as used by the district court. *See Equal Employment Opportunity Comm'n* v. *University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). As a respondent to a motion for summary judgment, Ms. Smith is required by Fed. R. Civ. P. 56(e) to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986).

To determine whether Ms. Smith has demonstrated the existence of a genuine issue for trial, we must set forth the legal requirements that govern her claim. To collect damages under § 1983, Ms. Smith must show that Officer Schulcz violated her son's fourth amendment right to be free from unreasonable searches and seizures, which has been applied to states and municipalities by the fourteenth amendment. As the Supreme Court has stated, "*all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amend-

ment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989) (emphasis in original). The eighth amendment does not apply to this case, because "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977).

Thus, to survive a motion for summary judgment, Ms. Smith must designate specific facts demonstrating that Officer Schulcz acted unreasonably in shooting her son. In *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985), the Supreme Court addressed the issue of when policemen may reasonably use deadly force. It struck down a state statute that authorized the use of deadly force against fleeing suspected felons, including those who were unarmed and presented no danger. However, the Court did not forbid all use of deadly force in seizing suspects. Instead, it established the following rule:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

471 U.S. at 11. In the proceedings below, the district court held that Officer Schulcz's actions met this standard, even though it decided that "Officer Schulcz was not in any immediate personal danger at the time he discharged his weapon." It concluded that a "reasonable officer in those circumstances would certainly believe that if Mr. Smith continued this escape attempt, he posed a significant threat of physical injury to numerous others." Thus, it determined that Officer Schulcz did not violate Mr. Smith's rights.

On appeal, Ms. Smith claims that the district court overlooked certain issues of material fact in its decision. Specifically, she avers that at the very moment Officer Schulcz shot Mr. Smith, a police roadblock at the end of

Woodbine Avenue prevented any escape by Mr. Smith and rendered the use of deadly force completely unnecessary. Moreover, she argues, a reasonable officer could have known about the roadblock when he shot Mr. Smith. To support this argument, Ms. Smith notes that Officer Schulcz first radioed the Hamilton County Communications Center that he was "in pursuit" of Mr. Smith's car soon after he began to give chase. Having done so, he should have known that other officers would come to his aid. Officer Schulcz himself testified that "a pursuit will automatically mean officer needs assistance, and any officers in the vicinity will assist that officer." Officer Gordon supported this testimony, explaining that she did not need to contact him because he knew other officers were aware of his predicament. Next, Ms. Smith notes several eyewitnesses who testified that other police officers were blocking the end of Woodbine Avenue at the time of the shooting, thus preventing any escape.

Ms. Smith also invokes the *Garner* Court's statement that "[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." 471 U.S. at 9. She contends that the government interest at stake in this case, Mr. Smith's apprehension, could have been accomplished without using deadly force. Mr. Smith was evidently not armed, and any evidence that he used his car to assault Officer Schulcz was disputed. She concludes, therefore, that to hold that Officer Schulcz could use deadly force to apprehend Mr. Smith would mean that any reckless motorist could be subject to such force. Finally, she claims that Officer Schulcz violated Springdale's own policy regarding the use of deadly force. That policy evidently forbids officers to fire at moving vehicles, unless they are acting in self-defense. Further, it bans the firing of shots to apprehend someone suspected of a misdemeanor. Springdale Police Department General Order No. 46.

In determining whether Officer Schulcz acted reasonably,

we are guided by *Graham* v. *Connor*, 490 U.S. 386 (1989), in which the Supreme Court gave a more complete explanation of how courts should examine § 1983 claims that invoke *Garner*. The Court emphasized that " '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case. . . ." 490 U.S. at 396 (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)). The Court also held that in applying the test, judges must consider the difficulties of modern police work:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

490 U.S. at 396-97. This passage carries great weight in this case, since all parties agree that the events in question happened very quickly. Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Besides considering *Graham*, we note that at least one other court has rejected the idea that a surrounded suspect presents no danger to others. In *Reese* v. *Anderson*, 926 F.2d 494 (5th Cir. 1991), a policeman stopped a car after a high-speed chase. He ordered those inside the car to raise their hands, but one suspect reached below the officer's sight line

at least twice. The officer shot and killed the suspect. The plaintiff in *Reese*, like Ms. Smith, argued that the officer's actions were unwarranted because the suspects were surrounded. The Fifth Circuit rejected this argument, holding that the officer could reasonably have believed that the suspect had retrieved a gun. It offered the following reason for its conclusion:

> The fact that the vehicle was "totally surrounded" by police does not change matters; had [the suspect] in fact retrieved a gun from his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this.

926 F.2d at 501.

In light of these cases, and after a careful scrutiny of the facts, we are convinced that summary judgment should be granted to Officer Schulcz. After a dramatic chase, Officer Schulcz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably. Even if there were a roadblock at the end of Woodbine Avenue, Officer Schulcz could reasonably believe that Mr. Smith could escape the roadblock, as he had escaped several times previously. In any event, Mr. Smith had freed his car from Officer Schulcz's attempted blockade, and was undoubtedly going to escape from Officer Schulcz, if not the entire police force. Had he proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the raodblock. Even unarmed, he was not harmless; a car can be a deadly weapon. *See, e.g., United States* v. *Sanchez*, 914 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991). Finally, rather than confronting the roadblock, he could have stopped his car and entered one of the

neighboring houses, hoping to take hostages. Mr. Smith had proven he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others.

Furthermore, the fact that Officer Schulcz's actions may have violated Springdale's policies regarding police use of force does not require a different result. Under § 1983, the issue is whether Officer Schulcz violated the Constitution, not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under § 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense. Ms. Smith's position, if adopted, would encourage all governments to adopt the least restrictive policies possible. While not expressly saying so, the Seventh Circuit has already recognized that city policies do not determine constitutional law. In *Ford* v. *Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc), the Seventh Circuit held that a police officer acted reasonably in shooting at a fleeing bank robbery suspect after giving the suspect two warnings, even though he could not be certain the suspect was armed. An expert testified that the officer's actions had violated the city's police manual and generally accepted police practices. Rather than considering these local rules, the court limited its attention to whether the officer had violated *Garner*. We believe this is the proper approach, and we adopt it in this case.

III

As noted above, Officer Schulcz originally attempted to defend his actions by claiming to have acted in self defense. However, the district court did not rest its decision on that ground, ruling instead that deadly force was necessary to prevent Mr. Smith's escape and that Mr. Smith posed a significant threat to others. Ms. Smith now contends that this deci-

sion placed her at a disadvantage. She claims that she could not properly prepare for this argument, because the focus of discovery was whether Officer Schulcz *himself* was in danger, rather than the presence of danger to others. She cites this court's warning that "summary judgment should not ordinarily be granted before discovery has been completed," and notes that "[t]his principle is particularly strong with constitutional and civil rights claims are at issue." *Tarleton* v. *Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir. 1983).

This court has recognized the following principles regarding this issue:

> "A court is not confined to the particular propositions of law advanced by the parties on a motion for summary judgment. Once it is determined that there is no genuine issue as to any material fact and that a party is entitled to the benefit of a judgment as a matter of law, judgment should be entered even though the legal principles relied upon by the court may differ from those that have been urged by the litigants."

Ware v. *Trailer Mart, Inc.*, 623 F.2d 1150, 1154 (6th Cir. 1980) (quoting 10 Charles Wright & Arthur Miller, Federal Practice and Procedure, § 2725). As the rest of this opinion makes clear, Mr. Smith's danger to others was self-evident. Asking the district court to require further discovery on the issue would merely introduce useless delay into the proceedings. Furthermore, even if the district court considered the danger to others, rather than to Officer Schulcz, it did not introduce new legal principles to the case. The law governing whether an officer acted reasonably is the same whether the officer sought to protect himself or others.

IV

Because Officer Schulcz acted reasonably, Mr. Smith's rights were not violated. Thus, Ms. Smith has no claim

against Springdale or Chief Freland, and we affirm the district court's dismissal of charges against these defendants. Finally, we believe the district court acted properly in dismissing Ms. Smith's state claims. As the Supreme Court has stated, "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, the district court's decision is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-89-605

PATRICIA SMITH, Individually and as Administratrix of the Estate of Brent Robin Smith,
Plaintiff,

vs.

CITY OF SPRINGDALE, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

(Filed May 9, 1991)

This matter is before this Court for consideration of motions for summary judgment filed by defendants City of Springdale and James Freland (doc. 11) and defendant Peter Schulcz (doc. 18). The plaintiff filed a memorandum in opposition to both motions for summary judgment (doc. 27) and a supplemental memorandum in opposition to the motions by defendants City of Springdale and James Freland (doc. 32). The defendants replied (doc. 29 and doc. 30). A hearing on these motions was convened May 3, 1991.

On October 31, 1988, Officer Peter Schulcz of the Springdale Police Department observed an automobile leaving an apartment complex in a reckless manner. The driver of the automobile was later identified as the deceased, Brent Robin Smith. A chase ensued during which Officer Schulcz pursued Mr. Smith at speeds in excess of 90 miles per hour. At one point in the chase, Mr. Smith had backed up into a field at the edge of an asphalt roadway. It appeared that Smith's vehicle was stuck so Officer Schulcz began to pull his vehicle in front of Smith's vehicle. Suddenly, Mr. Smith came for-

ward at a rapid pace and swerved his vehicle toward Officer Schulcz's cruiser. Schulcz swerved to the right to avoid a collision and then tried to position his vehicle in front of Mr. Smith's vehicle. Mr. Smith again swerved his vehicle toward the police cruiser. At that time, Schulcz permitted Mr. Smith to position his car in front of the police cruiser, and advised the county dispatcher that the suspect (Mr. Smith) was now wanted for assault on a police officer. Officer Schulcz maintained radio contact with local police departments in an effort to obtain assistance in arresting Mr. Smith. However, Mr. Smith continued to elude all police officers and drove off the road and around an attempted police road block.

Mr. Smith eventually proceeded onto Woodbine Avenue, a dead end residential street. At the end of the street, Mr. Smith tried to turn his vehicle around in a lawn. Officer Schulcz attempted to position his vehicle such that Mr. Smith would be unable to escape. When Officer Schulcz believed Smith's vehicle was immobilized, Officer Schulcz instructed Mr. Smith to surrender over the police public address system, exited the police cruiser, and began moving around the rear of the cruiser with the intent of extracting Mr. Smith from his vehicle. However, Mr. Smith backed up his vehicle, moved it forward until it struck the police cruiser, backed up again and "peeled out" around the police cruiser in an attempt to escape. The Smith vehicle struck a fence and gate and drove within several feet of Officer Schulcz. It is disputed whether Mr. Smith drove directly at Officer Schulcz, and whether Officer Schulcz was forced to move backward in order to avoid being struck by the Smith vehicle. Officer Schulcz drew his gun and fired one shot at the Smith vehicle. The bullet entered the passenger side of Smith's vehicle, pierced the cushion of the passenger seat, then struck Mr. Smith in his right side. Mr. Smith was dead on arrival at Mercy Hospital. The entire incident on Woodbine lasted only seconds.

The City of Springdale, through Chief of Police James Freland, conducted an investigation of the shooting. Chief Freland was not on duty that evening nor was he involved in the shooting in any way. It is admitted that Officer Schulcz

was adequately trained prior to the incident, and there were no complaints against Officer Schulcz alleging the use of excessive force prior to the shooting of Brent Smith.

Following the Smith shooting, Chief Freland made a complete investigation of the circumstances. The investigation included information gathered by the City of Sharonville (where the actual shooting occurred), photographs of the route of the chase and the scene of the shooting, and the opinion of an expert who was retained in an attempt to calculate the relative positions of the Officer and Smith's vehicle at the time of the shooting. On January 10, 1989, Chief Freland issued a report finding that no disciplinary action was warranted.

The plaintiff initiated this action against Officer Schulcz, Chief Freland, and the City of Springdale pursuant to 42 U.S.C. § 1983 alleging that the defendants, under color of state law, deprived plaintiff's decedent of his right to life, liberty and due process under the Fourteenth Amendment, the right to be free from cruel and unusual punishment under the Eighth Amendment, and the right to be free from unreasonable seizures under the Fourth Amendment, and that the plaintiff, as the decedent's mother was deprived of her liberty interest in familial companionship. The plaintiff also alleges state law claims for wrongful death and survivorship pursuant to Ohio Revised Code § 2125.01 and § 2305.21. The defendants then filed these motions for summary judgment.

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th

Cir. 1982). The moving party "has the burden of showing *conclusively* that there exists no genuine issues as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied*, 444 U.S. 986 (1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." Id. at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.* (quoting Rule 56(c), Fed. R. Civ. P.). Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.* We are further guided by the Supreme Court's recent elaboration of this standard in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial . . . .

477 U.S. at 322.

DISCUSSION

Officer Schulcz is Entitled to Summary Judgment on Plaintiff's § 1983 Claim

Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immuniites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1983 (1981). Section 1983 does not confer additional substantive rights, but rather provides a method by which a plaintiff may vindicate federal rights conferred elsewhere. *Graham* v. *Connor*, ____ U.S. ____, 109 S.Ct. 1865 (1989). "[A]ll claims that law enforcement officers have used excessive force — deadly or not — in the ocurse of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at ____, 109 S.Ct. at 1871. Further, the Eighth Amendment is not applicable, here, because Eighth Amendment scrutiny is appropriate only after prosecution and conviction. *See Graham* v. *Connor*, ____ U.S. ____, 109 S.Ct. 1865 (1989); *See also Ingraham* v. *Wright*, 430 U.S. 651, 671, n. 40 (1977).

To determine whether a seizure is constitutional, "[w]e must balance the nature and quality of the intrusion against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)). In *Garner*, the Supreme Court concluded that deadly force may be used only when it is necessary to prevent the suspect's escape and the officer reasonably believes that the suspect poses a significant threat of death or serious physical injury to the officer or to others. *Garner*, 471 U.S. at 3. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 109 S.Ct. at 1872. Ultimately, the question is whether the officer's actions were objectively reasonable in view of the particular facts and circumstances with which he was con-

fronted considering that police officers must often make split-second decisions under circumstances that are "tense, uncertain, and rapidly evolving." *Id.*

As set forth above, in considering a motion for summary judgment, this Court must view the evidence in the light most favorable to the non-moving party. *Smith v. Hudson*, 600 F.2d 60 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979). In this case, both the plaintiff and the defendants agree that Officer Schulcz had just completed the sort of high speed chase one generally sees only on television. In the course of that chase Mr. Smith violated numerous laws including attempted assault on a police officer, and exiting the roadway in an attempt to drive around a police roadblock. When Officer Schulcz thought he had the Smith vehicle immobilized, he exited his vehicle intending to arrest Mr. Smith. Mr. Smith then jockeyed his vehicle around the police cruiser, and "peeled out" in an attempt to escape. During this escape attempt, Mr. Smith swerved his car around the cruiser and within several feet of Officer Schulcz. Officer Schulcz stated in his affidavit that he was directly in the light of the headlights from Smith's vehicle, and believed that Smith was speeding at him in an effort to kill the officer. Officer Schulcz then fired a single shot at the Smith vehicle. For purposes of this motion, this Court must conclude that Officer Schulcz was not in any immediate personal danger at the time he discharged his weapon. The bullet entered the passenger window approximately 12 inches forward of the rear edge of the window, pierced the passenger seat cushion, and then struck Mr. Smith in the right side.

It is the opinion of this Court that a rational jury could reach but one result — Officer Schulcz did reasonably believe that deadly force was necessary to prevent Mr. Smith's escape and that Mr. Smith posed a significant threat of serious physical injury to others. Officer Schulcz had just observed Mr. Smith race through populated areas at speeds in excess of ninety miles per hour, attempt to assault a police officer, drive north in a southbound lane in spite of other traffic, exit the roadway to avoid a police roadblock, and run over a fence

and gate in an attempt to escape from a dead end residential street. A reasonable officer in those circumstances would certainly believe that if Mr. Smith continued this escape attempt, he posed a significant threat of physical injury to numerous others. Therefore, Officer Schulcz was entitled under the United States Constitution to use deadly force to prevent Mr. Smith's escape.

Accordingly, Mr. Smith was not deprived of a consitutional right and Officer Schulcz's motion for summary judgment on that claim is hereby granted.

The City fo Springdale and Chief of Police James Freland are Entitled to Summary Judgment of Plaintiff's § 1983 Claims

Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1983 (1981). A municipality is a "person" within the meaning of § 1983, and as such may be sued directly if there is (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). In this case, this Court has determined that Mr. Smith was not subjected to a deprivation of a constitutional right. Accordingly, the motion for summary judgment filed on behalf of the City of Springdale and Chief of Police James Freland is hereby granted.

All Pendant State Claims Must be Dismissed for Lack of Jurisdiction

Because the federal claims have been resolved on defendants' motions for summary judgment, this Court no longer has jurisdiction over plaintiff's state claims. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Accordingly, the plaintiff's state law claims are hereby dismissed.

CONCLUSION

For the reasons set forth above, this Court concludes that a rational jury could reach but one conclusion in this matter — that Mr. Smith was not deprived of his rights under the Fourth Amendment. Accordingly, defendants' motions for summary judgment as to plaintiff's § 1983 claims are hereby granted. As a federal question no longer exists in this matter, this Court no longer has jurisdiction over the plaintiff's state claims. Accordingly, plaintiff's state claims are hereby dismissed.

SO ORDERED.

/s/ S. ARTHUR SPIEGEL
United States District Judge

Dated: 5/2/91

SPRINGDALE POLICE DEPARTMENT

General Order No. 46

USE OF FORCE; DISCHARGING OF FIREARMS BY POLICE PERSONNEL

General Policy:

The members of the Springdale Police Department shall exhaust all reasonable means in resolving disputes before resorting to the use of firearms. Deadly force must never be used on "mere suspicion" alone. The safety of innocent people is of paramount importance. Where there is substantial and imminent risk to the safety or life of an innocent citizen, the safety of the citizen should take precedence regarding any action a police officer might take.

At such time a police officer interprets a situation to be threatening (in terms of loss of life or serious physical harm to himself or others), he has the authority to remove his sidearm from his holster and have it ready for the purpose of self-defense of himself or others.

To achieve the purpose of this order and to comply with the law, the Springdale Police Department Policy governing the use of firearms is as follows:

I. *Self Defense:* A police officer is authorized to use that force reasonably necessary to protect himself or others from loss of life or great bodily harm at the hands of another.

   A. There must be a perception of real or immediate danger based upon an overt and/or constructive act by another.

      1. "Mere suspicion" that a subject is armed is not sufficient proof to justify the use of a firearm.

      2. A police officer, having information and perceiving circumstances which cause him to believe that the use of force is necessary, may use that force reasonably necessary to protect himself or others.

II. *Warning Shots:* A police officer is authorized to use warning shots only under extreme circumstances as outlined in this section.

A. "Warning shots" should only be used if the police officer is convinced that:

1. A "warning shot" will save a life;
2. A "warning shot" will alleviate the need of taking a life; or,
3. A "warning shot" will alleviate the need for the use of deadly force or force likely to cause serious physical harm.

B. In using "warning shots", as with any shots, the officer must realize that innocent bystanders must not be endangerd.

C. All cases of this type will be reviewed and judged on their individual merits.

III. *Felonies.* A police officer is not authorized to discharge his firearm from the mere fact that an individual is committing or may have committed a felony. The use of a firearm is authorized as a last resort to resolve a dangerous situation. A police officer is authorized to use his firearm in order to apprehend a felon *only* under the following circumstances:

A. An officer may discharge his firearm to apprehend a fleeing felon when:

1. There is probably cause to believe that the suspect has committed a felony; *and*
2. The use of a firearm creates no substantial risk of death or injury to innocent persons; *and*
3. The suspect has threatened the police officer with a deadly weapon, *or* there is probable cause to believe that the suspect has committed a felony involving the infliction (or threatened infliction) of serious physical harm with a deadly weapon, *or* the officer has probable cause to believe that the suspect will

cause death or serious physical harm, either to the officer or another person, if not immediately apprehended.

B. When a police officer has probable cause to believe that a felony suspect will inflict fatal injuries or serious physical harm to the officer or another person during the commission of the felony and the use of such force presents no substantial risk of injury to innocent people.

C. A police officer may discharge his firearm when there is probable cause to believe a felony suspect will inflict fatal injuries or serious physical harm to the police officer or another person if his apprehension is delayed. Use of firearm to apprehend a suspect wanted by another agency will not be permitted unless this previous condition is fulfilled.

Notification by the Hamilton County Communications Center, the City Radio Dispatcher, LEERN Radio Communications, or as a result of general information that a subject is wanted by another agency, by *itself*, will not provide authority for the police officer to use a firearm to apprehend a fleeing felon.

D. If feasible, the officer should give verbal or other audible warning before resorting to the use of a firearm.

E. Ohio Revised Code, Chapter 2901.01 (E)(2), (3), (4), and (5) defines "serious physical harm to persons" as any of the following:

1. Any physical harm which carries a substantial risk of death;
2. Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

3. Any physical harm which involves some permanent disfigurement or which involves some temporary serious disfigurement;
4. Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

IV. *All Other Felonies:* In cases of all other felonies, NO SHOTS WILL BE FIRED BY POLICE PERSONNEL EVEN IF THE PERPETRATOR ATTEMPTS, OR SUCCEEDS IN HIS ATTEMPT TO FLEE.

A. An officer is not justified in using a firearm or any other deadly force to apprehend a fleeing felon in any situation other than those listed. The officer should be prepared to utilize other means at his disposal.

1. Radio Communications: With proper radio usage the officer can instantly turn a one-man foot chase into a multiple unit search.
2. Canine: The use of a canine unit may provide assistance.
3. Investigative Techniques: Through proper and careful use of investigative techniques such as crime scene search, collection and preservation of evidence, interviewing, fingerprinting, etc. an officer may apprehend the suspect as well as provide a stronger case in court.

V. *Misdemeanors:* If effecting the arrest of a person known or believed to have committed a misdemeanor, NO SHOTS WILL BE FIRED BY POLICE PERSONNEL EVEN IF THE MISDEMEANANT ATTEMPTS OR SUCCEEDS IN HIS ATTEMPT TO FLEE.

VI. *Persons of Impaired Capacities:* Officers must

recognize that persons of impaired capacities such as juveniles, intoxicated persons, those influenced by drugs, and persons who have just experienced trauma, may not react or respond in a similar manner as a person who has full use of his or her faculties. To the degree the officer recognizes the impaired capacity of a person, he should consider that factor in determining the proper use of force.

VII. *Moving Vehicles:* NO SHOTS will be fired from moving vehicles, or at fleeing vehicles, unless the situation becomes one of self-defense.

A. If the suspect is using a motor vehicle as a means of escape, the officer may not fire his revolver at the vehicle.

B. Only when the suspect ceases using the vehicle as a means of transportation and begins using it as a deadly weapon may an officer use his firearm to stop the attack.

1. Officers should be aware that in most instances their stepping in front of a moving vehicle or driver occupied vehicle will fail to stop the vehicle and will needlessly endanger the officer's life.

VIII. *Shots Fired at Animals:* The prime consideration is common sense and discretion. A firearm must only be used as a last resort or for the protection of himself or others. He must be assured that the projectile will strike its target. In some cases, the firing of a shot at an animal will create an even more dangerous situation than the animal itself. If there is time, an alternative solution may be:

A. If possible, call the S.P.C.A.;

B. Call the Cincinnati Zoological Society, in some instances;

C. Use a snare, or dart gun if available.

IX. *Procedure — Shots Fired:*

A. All shots fired by police department personnel will be reported to the supervisor in charge, who will thoroughly investigate and report to the Police Chief.

1. The duty investigator will be called out, and will assist in any investigation.
2. The Chief of Police will be notified of any investigation by the supervisor in charge.
   a. The Police Chief will be in charge of any investigation, either directly or through another officer so delegated.
   b. Results of any investigation will be forwarded in report form from the Chief's office to the City Administrator's office and to the Mayor's office.
   c. A copy of any report will be placed in the officer's personnel jacket.

B. The immediate supervisor and all other officers shall refrain from comments concerning the propriety of the action taken unitl after the investigation has been completed. Any statement will come from, or be authorized by, the Chief's office.

C. Summary:

Nothing stated in this procedure grants immunity nor is intended to expand any liability to the officer involved, since each case must be met and dealt with according to individual circumstances. This procedure is intended for the internal regulation of the department with reference to the use of force and the discharging of firearms.

Department personnel are reminded that the safety of each officer and of innocent people must be given primary consideration whenever

firearms or other types of force are used. An officer may use only the degree and type of force which is commensurate with his lawful purpose and the situation presented. In all cases, unnecessary force to effectuate an arrest or to control a subject will not be condoned.

Chief James Freland
Springdale Police Department
Springdale, Ohio

Supreme Court, U.S.
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(2)

No. 91-1602

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA SMITH,

Petitioner,

vs.

JAMES FRELAND,
CITY OF SPRINGDALE, OHIO,
PETER SCHULCZ III

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT PETER SCHULCZ III'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals properly found that the Respondent officer was objectively reasonable in his use of deadly force under the circumstances.

2. Whether the Respondent police officer was entitled to qualified immunity for his use of force under *Anderson* v. *Creighton*, 483 U.S. 635 (1987) and *Graham* v. *Connor*, 490 U.S. 386 (1989) where the officer reasonably believed the suspect presented a threat of serious harm to him or to others, and where the officer had to make a split second decision as to the use of force.

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IN THE

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PATRICIA SMITH,

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CITY OF SPRINGDALE, OHIO,
PETER SCHULCZ, III

Respondents.

BRIEF OF THE RESPONDENT PETER SCHULCZ III IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent Peter Schulcz III respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 954 F.2d 343 (1992).

RESPONDENT PETER SCHULCZ III'S PROCEDURAL STATEMENT OF THE CASE

On October 31, 1988, at approximately 9:30 p.m. Respondent Peter Schulcz III, an officer of the Springdale, Ohio police department, shot and killed Brent Smith (hereinafter

referred to as "Smith") after an automobile chase and confrontation with Smith as will be more fully described in Respondent Schulcz's factual statement. The Petitioner then filed suit against Respondent Schulcz, Police Chief James Freland and the City of Springdale, Ohio (hereafter collectively referred to as "Respondents") under Title 42 U.S.C. § 1983 ("§ 1983"). The claim against Respondent Schulcz generally alleged that he used excessive force causing Smith's death. The claims against Resondents Freland and the City of Springdale generally alleged a failure to train and ratification of unconstitutional conduct.

The Respondents filed Motions for Summary Judgment. In his Motion, Respondent Schulcz asserted that judgment should be entered in his favor because he was entitled to qualified immunity. The Motions for Summary Judgment filed by the Respondents were supported by a complete record which included affidavits and depositions of Respondents Schulcz and Freland, depositions of all witnesses to the police chase and shooting, the complete investigative record made by the City of Springdale and the City of Sharonville (where the shooting occurred), as well as photographs and diagrams of the scene of the chase and shooting.

The trial court granted Summary Judgment in favor of the Respondents. With respect to Respondent Schulcz, the trial court correctly found that he had acted reasonably and in accordance with the dictates of this Court as stated in *Tennessee* v. *Garner*, 471 U.S. 1 (1985) and *Graham* v. *Connor*, 490 U.S. 386 (1989). The Sixth Circuit Court of Appeals unanimously and correctly affirmed the trial court's grant of Summary Judgment in favor of Respondent Schulcz.

RESPONDENT PETER SCHULCZ III'S FACTUAL STATEMENT OF THE CASE

On October 31, 1988, at approximately 9:30 p.m., Respondent Peter Schulcz, an officer of the Springdale, Ohio police department, observed Smith operating an automobile in a reckless manner. Respondent Schulcz pursued Smith, and a chase ensued. While pursuing Smith, Respondent Schulcz chased Smith for approximately 2.6 miles and Smith drove at him on at least two occasions. Further, during the chase Respondent Schulcz informed the county dispatcher that Smith was wanted for assault on a police officer. Respondent Schulcz remained in radio contact with the dispatcher and other officers throughout the entire period of time he pursued Smith.

In an attempt to stop Smith, who was traveling at speeds as high as 90 miles per hour, Janice Gordon, a Sharonville, Ohio police officer, set up a road block. However, Smith was able to avoid the road block, and did so while driving at a high rate of speed. After maneuvering around the road block, Smith pulled onto Woodbine Avenue in Sharonville, Ohio, and Respondent Schulcz followed Smith down that street. Woodbine Avenue is a dead end street approximately 15 to 20 feet wide, located in a residential area of Sharonville, Ohio.

At the end of Woodbine Avenue Smith tried to turn his vehicle around in a lawn. After some jockeying of the vehicles, the police vehicle driven by Respondent Schulcz and Smith's car came nose to nose. Schulcz shouted to Smith over his loud speaker to "give it up". At that time Respondent Schulcz believed that Smith's car was immobilized as there was a local swimming pool building immediately behind and a fence and a gate to the left of Smith's vehicle. Respondent Schulcz then got out of his car and moved around its rear, intending to remove Smith from his vehicle. Suddenly, Smith backed up his car, and sped forward and crashed into Respondent Schulcz's vehicle. Smith backed up again and smashed into the fence and gate as he sped around the police

vehicle. Smith drove towards Respondent Schulcz, who was directly in the light of the headlights from Smith's vehicle. Schulcz believed that Smith was speeding at him in an effort to hit him.

As Smith "peeled out" and drove his speeding vehicle in the direction of Respondent Schulcz, the officer drew his weapon and fired one shot. The bullet went through the passenger window of the Smith vehicle, entered the passenger window approximately 12 inches forward of the rear edge of the window, pierced the passenger seat cushion, and then struck Smith in the right side. Smith's vehicle continued down Woodbine Avenue, where it came to a stop due to Smith's injuries.

While Respondent Schulcz was involved in his confrontation with Smith at the dead-end of Woodbine Avenue, Officer Gordon had positioned her vehicle at the entrance of Woodbine Avenue, and had exited her vehicle with her shotgun drawn. Officer Gordon at that time clearly believed that Smith was a danger to her.

Because Respondent Schulcz remained in radio contact throughout his attempts to stop Smith, there is an accurate time record and transcript made of the radio reports from Respondents Schulcz to the dispatcher. Further, all of Respondent Schulcz's radio transmissions were tape recorded. As a result, it is undisputed that, from the time Respondent Schulcz radioed that he was entering Woodbine Avenue to the time that he radioed that a shooting had taken place, a total of only sixty-seven seconds elapsed. Only seconds elapsed from the time that Respondent Schulcz exited his vehicle with the intention of removing Smith from his vehicle until the moment it became necessary for Respondent Schulcz to use his weapon.

The Petitioner has appended to her Petition the district court Order granting the Motions for Summary Judgment. The Sixth Circuit's Decision is also found in the Appendix attached to the Petition for a Writ of Certiorari. The Sixth Cir-

cuit's factual findings are virtually identical to the statement of facts set forth by the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No reasons exist for the grant of certiorari as the trial court and the Sixth Circuit applied well settled principles of law in granting summary judgment in favor of the Respondent Schulcz.

By its decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), this Court provided a workable framework for the analysis of the use of force by a police officer. That decision takes into account the sometimes competing policies of providing effective and safe law enforcement operations and protecting the constitutional rights of those upon whom force is exercised by police officers. In *Graham*, this Court held that all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop or other "seizure" should be analyzed under the Fourth Amendment and its "reasonableness" standard rather than under a substantive due process approach. 490 U.S. at 395. In *Tennessee* v. *Garner*, 471 U.S. 1 (1985), this Court held:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given. 471 U.S. 11-12.

Clarifying its decision in *Garner*, this Court in *Graham* provided the standards against which the reasonableness of the use of force by an officer must be judged:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation. 490 U.S. 396-97.

Contrary to the Petitioner's assertion, this is precisely the standard the district court and Sixth Circuit used in analyzing the claims made in this case. The Petitioner has incorrectly stated that the Sixth Circuit has created a "per se" rule permitting the use of deadly force against the driver of a fleeing vehicle. A cursory analysis of the decisions of the district court and Sixth Circuit reveals that neither applied a "per se" rule but, in fact, closely followed this Court's dictates in *Garner* and *Graham*. More specifically, a careful reading of the decisions of the district court and Sixth Circuit reveals that the decisions were based upon the particular factual circumstances confronting Respondent Schulcz on the night of October 31, 1988. As such, the district court and the Sixth Circuit obviously followed this Court's direction that reasonableness is to be judged by the particular circumstances confronting an officer. *Graham*, *supra* at 397.

The record is clear that both the district court and the Sixth Circuit found that, under the totality of circumstances, Respondent Schulcz had probable cause to believe that Smith presented a danger, if not to him, then certainly to others. The touchstone issue here — one explicitly recognized by both courts — is whether or not Respondent Schulcz's actions were reasonable under circumstances where he had probable cause

to believe that Smith was a danger either to himself and/or to others. As such, the district court and the Sixth Circuit's decisions did nothing more than apply the settled principles of *Garner* and *Graham* to the facts presented.

The Petitioner claims in her first question presented that, because Smith "did not present a threat of death or serious harm to the Officer", summary judgment should not have been granted in favor of Respondent Schulcz.[1] However, the Petitioner simply ignores that the use of deadly force is also appropriate where an individual such as Smith is a danger to others. Both the district court and the Sixth Circuit found that, as a matter of law, Smith was a danger to others and, for that reason, summary judgment in favor of Respondent Schulcz was appropriately granted.

Certiorari should not be granted in this case as the Petitioner is essentially asking this Court to review evidence and facts presented to the trial court and the court of appeals. The Court has consistently held that it will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) and cases cited; *See, e.g., Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982). "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). *See Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Finally, the Petitioner also asserts that summary judgment should have been denied because evidence that Respondent Schulcz may have violated his own police department's

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[1] Respondent Schulcz does not concede that he did not believe that Smith presented a serious threat to him. In fact, Respondent Schulcz has unequivocally stated that he was in fear that Smith was attempting to strike him with his vehicle.

policy,[2] which embodies the standards this Court adopted in *Garner* and *Graham*, creates a genuine issue of fact. This argument must fail for one of two reasons. First, if, as the Petitioner claims, the department policy merely incorporates the standards of *Garner* and *Graham* then the analysis used and conclusions reached by the district court and the Sixth Circuit are precisely the same irrespective of which standard is applied. The result will be no different. Second, if the Petitioner claims that the department policy creates a higher constitutional standard to be used by federal courts when addressing a use of force claim, she is simply wrong. As the Sixth Circuit correctly stated, "[t]o hold that cities with strict policies commit more violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense." In short, departmental policies do not determine constitutional law.

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[2] Respondent Schulcz denies that his actions were in violation of the City of Springdale, Ohio Police Department policies. However, for the purposes of Respondent Schulcz's motion for summary judgment whether or not he acted in violation of a policy is of no legal significance.

2. Under the facts of this case the District Court and Sixth Circuit correctly decided the case because Respondent Schulcz was entitled to qualified immunity.

The basis of Respondent Schulcz's Motion for Summary Judgment was that judgment should be entered in his favor because he is entitled to qualified immunity. Following this Court's admonition that, where facts may be in dispute as to the existence of an officer's qualified immunity, discovery may go forward on those issues, (*Anderson* v. *Creighton*, 483 U.S. 635, 646-647, n.6), Respondent Schulcz supported his Motion for Summary Judgment with a complete factual record for the district court's review. However, the district court did not address Respondent Schulcz's argument relating to qualified immunity but, after carefully reviewing all of the undisputed facts, found that the use of force was reasonable under *Graham* and *Garner*. As fully discussed above, the district court and the Sixth Circuit found that it was reasonable for Respondent Schulcz to use deadly force to prevent Smith from leaving the scene and harming others. More specifically, both courts, while applying the "objective reasonableness" standard of *Graham*, found that Smith clearly presented a risk of serious physical harm, if not to Respondent Schulcz, then to others. In so ruling, the district court and the Sixth Circuit carefully evaluated the particular circumstances confronting Respondent Schulcz.

It is important to note that a second reason — one the district court did not address — existed supporting judgment in favor of Respondent Schulcz. *Anderson* v. *Creighton*, 483 U.S. 635 (1987) provides an officer with an objective "good faith" immunity defense in a "use of force" setting. That is, if the officer could reasonably have believed that the force used did not violate the Fourth Amendment, he is entitled to qualified immunity from suit under 42 U.S.C. § 1983. *See Graham*, *supra*, at 399 n.12.

At the time this shooting occurred, this Court had clearly established that an officer may use deadly force where he has probable cause to believe that a suspect presents a threat either to the officer or others. When this Court established that standard, it was cognizant that officers often must act quickly and without the luxury of time to weigh various alternatives. As such, this Court has recognized that an officer, when presented with a life and death situation, may make the wrong decision and still be immune from liability.

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable. *Anderson* v. *Creighton*, 483 U.S. at 641.

Because both the district court and the Sixth Circuit properly found that the use of force was reasonable under the *Garner* and *Graham* standard — a standard *more* stringent than the one used when analyzing the qualified immunity defense — it was not necessary for either to address the qualified immunity issue. However, should certiorari be granted, Respondent Schulcz intends to argue that he is entitled to judgment in his favor on the basis of his qualified immunity.

In order for Respondent Schulcz to be entitled to judgment in his favor on the basis of qualified immunity it must be shown that a reasonable police officer in the position of Officer Schulcz could have believed that his actions were lawful in light of the law clearly established on October 31, 1988. Respondent Schulcz submits that, under the facts of this case, it is clear that he has made this showing.

The undisputed facts make clear that Respondent Schulcz had probable cause to believe that Smith was either attempting to run him down *or* was a danger to others. Respondent

Schulcz had been chasing Smith at high speeds through a partly residential area when, after it appeared that Smith's vehicle had finally been stopped and Respondent Schulcz was approaching Smith's vehicle, Smith drove his vehicle directly at Respondent Schulcz. Smith gave every indication that he intended to continue avoiding arrest, even if that meant using his vehicle as a weapon against those who blocked his escape. Although no one will ever know for certain what Smith's intentions were that night, it is clear that a reasonable police officer standing in the shoes of Respondent Schulcz on the night of October 31, 1988 would have believed that Smith was attempting to run him down and that he was a serious danger to others.

CONCLUSION

Implicit in the holding in *Graham* v. *Connor* is the acknowledgement that police officers are often put in difficult and dangerous situations. Police officers are trained to respond to those dangers; and of necessity, their responses must be at times immediate and without any opportunity to reflect fully. Reaction times are often brief and decisions must be made under fact situations involving great stress. To force an officer to delay his decision will often result in the injury or death of an officer or others. As it is, officers are injured or killed every year because of their failure to adequately respond in time to threatening situations. *See United States* v. *Robinson*, 414 U.S. 218, 234 n.5 (1973) (discussing danger to officers in traffic stops). In order to protect themselves and members of the public under these circumstances, police officers must be free to make the instantaneous decisions necessary to prevent injury to themselves or innocent bystanders without fear of civil liability.

The district court and the Sixth Circuit Court of Appeals correctly found that based upon the undisputed facts the use of force by the Respondent Schulcz was reasonable. Accordingly, for the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioner,

v.

JAMES FRELAND, et al
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a city and its police chief can be held liable for damages under 42 U.S.C. Section 1983 arising from the fatal shooting of an offender by a patrolman where the city has in place an adequate training program and constitutionally valid rules, there is no pattern of prior incidents of the use of excessive force and following the incident the chief conducts an adequate investigation.

2. Whether Ohio Revised Code Section 2744.02 and 2744.03 provide a city and its police chief with immunity from a state wrongful death claim arising from the fatal shooting of an offender by one of the city's officers.

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B. Ohio Revised Code Sections 2744.02 and 2744.03 provide a city and its police chief with absolute immunity from state law wrongful death and survivorship claims arising from the shooting of a fleeing offender by a member of the police force.

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C. Where a plaintiff petitions for a Writ of Certiorari to review a judgment in favor of all defendants but argues error only as to one defendant, certiorari, if granted, should be limited to that defendant.

CONCLUSION 27

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No. 91-1602

In the Supreme Court of the United States

OCTOBER TERM, 1991

PATRICIA SMITH,
Petitioner,

v.

JAMES FRELAND, et al.,,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

At 9:22 P.M. in the evening of October 31, 1988, Officer Peter Schulcz of the Springdale Ohio Police Department observed an automobile leaving an apartment complex in a reckless manner and nearly colliding with another vehicle. Schulcz gave chase in his police cruiser. The driver of the vehicle attempted to elude capture, driving at a high speed approximately three miles northward into the adjoining county. At this point Officer Janice Gordon of the Sharonville Police Department joined the chase.

The fleeing motorist then reversed his course, proceeding southbound into the City of Sharonville, driving off the road in order to by pass a road block which Officer Gordon had set up with her cruiser. Officer Schulcz ultimately cornered the suspect and his vehicle at the dead end of Woodbine Avenue in Sharonville. However, the subject backed up and went around the cruiser proceeding to the other side of the street. Officer Schulcz then maneuvered his cruiser so as to again block the subject's vehicle with the vehicles stopped front to front. Officer Schulcz then got out of his police cruiser and attempted to arrest the subject. At this point the subject drove forward toward the officer, striking the police car and driving through a fence. Officer Schulcz fired one shot killing the driver who was later identified as Plaintiff's decedent, Brent Robin Smith.

James Freland is the Chief of Police of the City of Springdale. Freland was not on duty that evening nor was he in any way involved in the pursuit or the shooting.

Officer Schulcz was hired by the City of Springdale on September 11, 1985. Before commencing work, he received his basic police training at the Norwood Police Academy. This basic training program was approved by the Ohio Peace Officer Training Council in accordance with the requirements of the Ohio Revised Code, Section 109.77. Thereafter Officer Schulcz received additional training all as detailed in Chief Freland's Affidavit. There were no complaints against Officer Schulcz alleging the use of excessive force prior to the shooting of Brent Smith.

The only incident involving the discharge of firearms by a Springdale police officer prior to the shooting of Smith occurred on September 2, 1981. A subject was shot and wounded when he attempted to escape during his arrest on a warrant for first degree murder.

The Springdale Police Department has an established system of performance evaluation review of its police personnel. Officer Schulcz received evaluations on

May 2, 1986, December 17, 1986 and December 28, 1987, and his performance was rated satisfactory on each review.

The Springdale Police Department has had in effect for a number of years a procedure for the processing and investigation of citizens' complaints regarding police actions. A regular printed form is provided. Witnesses are interviewed and there is an initial and final determination as to justification. Two such complaints have been filed and processed, one on August 7, 1986, and the other on September 28, 1988. Both are detailed in Freland's affidavit and neither was found to be justified.

Following the Smith shooting, Chief Freland made a complete investigation of the circumstances. This involved participation in the investigation conducted by the City of Sharonville. He also had photographs taken of the route of the chase and the scene of the shooting. An expert was retained in an attempt to calculate the relative positions of the Officer and Smith's vehicle at the time of the shooting. On January 10, 1989, Chief Freland issued his report finding that Officer Schulcz had acted reasonably and lawfully and that no disciplinary action was warranted. The matter had previously been submitted by the City of Sharonville to the Hamilton County Grand Jury, which ignored the case. All of the foregoing facts were established during discovery and with the exception of the precise details of the actual shooting, all were undisputed.

Patricia Smith filed suit in the U.S. District Court for the Southern District of Ohio individually and as administratrix of the estate of her son, Brent Robin Smith. The complaint sought compensatory and punitive damages from Officer Schulcz, Chief Freland and the City of Springdale under 42 U.S.C. Section 1983 and also under Ohio law. The allegations against the city and the Chief of Police were to the effect that pursuant to official policy, they had failed to properly train and supervise the police force and had created "an atmosphere of lawlessness" by encouraging the belief that acts of excessive force would be condoned.

The city and Chief Freland filed a joint motion for summary judgment asserting (1) that there was no basis for finding that the shooting of Smith resulted from an official policy of the city and (2) that the city and Chief Freland were immune from liability on the state law claims under Chapter 2744 of the Ohio Revised Code. In responding the plaintiff conceded that the city's training and policies were adequate. Plaintiff resisted the motion on the sole ground that chief had "ratified" the shooting by concluding, after investigation that no discipline was warranted.

Officer Schulcz also moved for summary judgment asserting qualified immunity based upon self defense. The District Court granted both motions finding that Smith's actions posed a significant threat of physical injury to others and that the shooting was justified. The Court of Appeals for the Sixth Circuit affirmed, essentially adopting the reasoning of the District Court.

SUMMARY OF THE ARGUMENT

I. Petitioner conceded that the city's training program was adequate and its written policy on use of force was constitutional. Discovery established that there were no prior incidents involving use of excessive force by members of the police force. The Chief of Police conducted a complete investigation of the matter and concluded that no disciplinary action was warranted. As a matter of law, it cannot be held that the shooting resulted from any official policy of the city.

II. Police Chief Freland and the City of Springdale are, under Ohio Statutory Law, immune from liability on state wrongful death and survivorship claims.

III. Since the petitioner has failed to question the judgment in favor of James Freland and the City of Springdale she has waived any error as to these parties. Certiorari should therefore not be granted as to their judgments.

ARGUMENT

I. A city and its police chief are not liable for damages under 42 U.S.C. Section 1983 resulting from the shooting of a fleeing offender by a police officer where the city's training program, policies and supervision are constitutionally adequate and the plaintiff's claim of ratification is based solely on the fact that the chief, after a complete investigation, concluded that discipline of the officer was not justified.

42 USC Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

Petitioner's claim is that her son was deprived of his right to "life, liberty and procedural and substantive due process under the Fourteenth Amendment; the right to be free from cruel and unusual punishment under the Eighth Amendment; and the right to be free from unreasonable seizures under the Fourth Amendment."

Petitioner attempted to state a claim against the chief and the city under the statute by alleging that:

> "The actions of Defendant Schulcz, previously described, in causing the death of Brent Robin Smith and Plaintiff's consequent injuries, were the direct and proximate result of gross negligence and deliberate indifference by the City of Springdale and Freland, which and who pursuant to official practice, policy, or custom of the City of

> Springdale, failed to properly and adequately train, instruct and supervise Springdale police officers, including Schulcz....Defendants created an atmosphere of lawlessness among the Springdale Police Department by encouraging the belief among police officers of that Department, including Schulcz, that acts of excessive force would be justified by their superiors and the City Administration."

Monell v. New York City, 436 US 658 (1978) held that municipalities are "persons" subject to damages liability under Section 1983 for violations of the Act committed by municipal officials. This Court however specifically held that municipal liability could not be premised merely upon respondeat superior. It was held that municipal liability could only be imposed for injuries inflicted pursuant to the municipality's "policy or custom."

Oklahoma City v. Tuttle, 471 US 808 (1985) held that while inadequate police training could be the subject of an official policy, such a policy could not be inferred from proof of a single incident of unreasonable force. This Court made it clear at page 823 that proof of such a "policy" would be a difficult hurdle:

> "In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training" unless evidence be adduced which proves that the inadequacies resulted from conscious choice - that is, proof that the policy makers deliberately chose a training program which would prove inadequate."

After discovery it became obvious that no such proof was available in this case. Petitioner therefore conceded in the District Court that there was no basis for a "failure to train" claim. Springdale chose a training program which is approved by the Ohio Peace Officer Training Council as

required of every municipality under Ohio Revised Code Section 109.77. Being the statewide standard, it was impossible to conclude that Springdale has deliberately chosen an inadequate training program.

Tuttle was cited with approval in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). This Court stated at page 1204:

> "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

The Sixth Circuit had previously held in *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982) that:

> "Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, the supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless and grossly negligent that future police misconduct is almost inevitable,....or would properly be characterized as substantially certain to result."

In view of the fact that there is no evidence of a single prior incident of the excessive use of force it is obvious that the Petitioner has not met this standard.

In the district court respondents served Interrogatories upon the Petitioner requiring her to disclose the evidence supporting the allegations of the Complaint relating to these respondents. Petitioner's response was as follows:

> "Following the fatal shooting of Plaintiff's Decedent, as set forth in the Statement of Facts in the Complaint, the City of Springdale and Freland condoned and ratified the actions of Schulcz, who used unwarranted, unreasonable, excessive and

> deadly force in seizing the person of Brent Robin Smith, as representative of and consistent with the official policy and practice of the City of Springdale in connection with the pursuit of motor vehicles; the stop and apprehension of criminal suspects; and the use of deadly force. The ratification of this official policy includes but may not necessarily be limited to failure of the City or Freland to discipline or to restrain or to retrain Schulcz and/or by commending his actions."

Thus the Plaintiff is relying solely on evidence of Defendants' actions after the shooting incident. Unquestionably, this is inadequate as a matter of law. The identical theory was rejected in *Batista v. Rodriguez*, 702 F. 2d 393 (2d Cir.1983). In that case, as in the present case, plaintiffs relied solely on the fact that the City failed to discipline the officers involved following an arrest involving an unreasonable use of force.

Although this court in *Tuttle* held that a municipal policy could not be inferred from the occurrence of a single instance of excessive force, it did not precisely define the requirements for such a claim. However, virtually all of the circuits have required evidence of a pattern of similar incidents of police misconduct. Without notice of such a pattern of prior incidents, a municipality can not be said to have a "policy" of condoning such activity.

Languirand v. Hayden, 717 F. 2d 220 (5th Cir.1983), stated the rule as follows:

> "We conclude that if there is a cause of action under Section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, then such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its Chief of Police,

> in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force."

Rodriguez v. Avita, 871 F. 2d 552 (5th Cir.1989), affirmed the granting of a Motion to Dismiss for failure to plead the existence of prior incidents.

Patzner v. Burkett, 779 F. 2d 1363 (8th Cir.1985), affirmed a Summary Judgment in favor of the County relying on the holding in *Tuttle*:

> "Further, absent a showing of prior misconduct, Burkett and Myerchin's behavior toward Patzner does not support an inference of notice to the County. The first isolated incident of misconduct by a subordinate employee generally is not enough to establish a policy or custom."

McClelland v. Fecteau, 610 F. 2d 693 (10th Cir. 1979), also held that prior notice of police misconduct was essential. The Court went on to note that there was abundant evidence of prior police misconduct which had been the subject of numerous newspaper articles and affidavits. A summary judgment in favor of the Police Chief was therefore reversed.

In *Wellington v. Daniels*, 717 F. 2d 932 (4th Cir.1983) the Court stated that:

> "Generally, a failure to supervise gives rise to Section 1983 liability, however, only in those situations in which there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel."

In *Hinshaw v. Doffer*, 785 F. 2d 1260 (5th Cir.1986), the Court reversed a judgment which had been entered against the police chief holding that there had been an inadequate showing of prior instances of misconduct by the individual police officer involved. While the Plaintiff had offered evidence of three incidents involving the same officer, the Court found that the chief had properly investigated all three instances and had reprimanded the officer on the only incident found to involve improper conduct.

Owens v. Haas, 601 F. 2d 1242 (2d Cir.1979), held that an official policy could be inferred without evidence of prior misconduct but the holding is limited to the peculiar facts of the case. This was an action by an inmate of a prison who had been beaten by seven prison guards. The testimony of one of the guards tended to indicate that the guards were following an accepted practice in dealing with a stubborn prisoner. The Court felt that because the incident occurred within the confines of a prison that it was likely that the prison officials were aware of the practice. In view of the holding in *Tuttle* this decision is clearly not applicable as against a municipality and its police chief.

After conceding the training claim, petitioner persisted with the untenable argument that the City of Springdale had in place a de facto policy of condoning the use of excessive force. Petitioner made this assertion while at the same time conceding that the city's written policy regarding the use of deadly force is constitutionally valid. The sole basis for this untenable argument is that Chief Freland, following an extensive investigation, concluded that Officer Schulcz's actions were justified. There is not a single reported decision holding that a de facto policy may be inferred from the sole fact that the city and its Police Chief determined, after investigation, that no disciplinary action was warranted. As will be demonstrated below, none of the cases cited by petitioner makes such a holding.

Petitioner cited *Pembauer v. Cincinnati*, 475 US 469 (1986) for the proposition that a single decision by the appropriate policy maker can constitute a policy. It was

unclear from plaintiff's argument whether she was pointing to the decision of Officer Schulcz to shoot Smith or the decision of Freland not to discipline Schulcz. In either event the facts of Pembauer completely distinguish it from this case. In Pembauer police officers broke down the door of a doctors office in an effort to execute an arrest warrant. This was done on the specific orders of the county prosecutor to "go in and get them". Under state law, a county prosecutor is a policy maker and thus the single decision could be the basis of liability. In that case the policy maker specifically ordered an unconstitutional act. This court did not hold nor has any other court held that an unconstitutional de facto policy could be inferred solely from the actions of the policy makers taken after the act in question.

Petitioner also cited *The City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988) but that case provides no support whatsoever for petitioner's argument. Praprotnik was a city employee who had been transferred and then laid off by his supervisor allegedly in retaliation for his appealing a prior employment decision. A judgment against the city was reversed by this court which held that the Mayor and City Council were the policy makers and not the supervisor who took the unconstitutional action. The court further held that the fact that such decisions were given substantial deference by the Civil Service Commission did not indicate that there had been a delegation of policy making authority. Due to the factual situation is doubtful whether the case has any application whatsoever to the present case.

Petitioner asserted that the facts of the present case were similar with the facts involved in *Grandstaff v. City of Borger*, 767 F. 2d 161 (5th Cir. 1985). In Grandstaff the entire night shift of the Borger Police Department, consisting of six officers, pursued a wanted felon onto the property of a private cattle ranch. During the pursuit on the highway the police had fired numerous shots at the

fleeing vehicle. The fugitive abandoned his truck and fled on foot amid a fusillade of more police gunfire. One of the bullets struck the home of Grandstaff who was the ranch foreman. Grandstaff was awakened by the noise and approached the police officers in his pickup truck. Although the policemen were aware that the fugitive had fled on foot all opened fire on Grandstaff's pickup truck, fatally wounding him as he got out of the truck. It was never established that the fugitive had fired upon the officers or that he was even armed. The police log was in evidence indicating that the entire event encompassed approximately 24 minutes and that the Chief of Police had been advised from the beginning of the officers actions. Although there was no evidence of prior misconduct of members of the Borger Police Force, there was extensive evidence from which the jury found:

> "The City of Borger was grossly negligent in failing to properly train its police officers and that serious incompetence or misbehavior was general or widespread throughout the City of Borger Police Force." (Grandstaff Pg. 170)

In Grandstaff when the plaintiffs completed their case and rested, the city rested without calling any witnesses and the Chief of Police did not testify. Thus, the plaintiff's evidence of lack of training was totally unrefuted. Plaintiff can hardly rely upon Grandstaff since it is conceded that there is no basis whatsoever for a claim that the city and Chief Freland failed to train the police force.

The facts in *Bordanaro v. McLeod*, 871 F. 2d 1151 (1st Cir 1989) are even more outrageous than those involved in Grandstaff and even farther removed from the fact situation in the case at bar. McLeod was an off duty policeman of the City of Everett, Massachusetts. On the evening in question he went with his girlfriend to a bar located in a motel in the adjoining City of Chelsea. He soon became involved in a brawl with one of the patrons who won the fight and threw McLeod out of the bar. McLeod

thereupon called his buddies on the Everett Police Department for help. With the knowledge of the lieutenant in charge, the entire night shift of the Everett Department proceeded out of their jurisdiction to the motel in Chelsea to avenge the beating of McLeod. Upon the approach of the police, McLeod's adversary and twelve other patrons of the bar sought refuge in a motel room where they locked the door. The Everett Policemen broke down the outer glass doors of the motel which had been locked due to the lateness of the hour. The owner of the motel and the manager offered to unlock the guest room with a pass key but the officers proceeded to assault and beat both of them. The police were armed with nightsticks, clubs, bats, tire irons, a fire axe and their service revolvers. They drilled a hole in the room door through which they sprayed mace. Thereafter one of the officers fired two shots through the door. When they finally broke the door down they proceeded to beat all of the occupants into an unconscious state. All were severely injured. Plaintiff's decedent, Vincent Bordanaro died as a result of the beating.

In *Bordanaro* one of the officers involved testified that the Everett Police Department had a long standing rule authorizing the breaking down of doors without a warrant when arresting a felon. The department even provided a sledge hammer for this purpose. The particular officer also testified that he had been involved in either twenty or thirty or fifty or sixty situations involving door break downs during his twenty-four years experience with the department. There was also affirmative evidence of a total failure to train the police department. The department was operating under a set of rules and regulations promulgated in 1951 and the plaintiff's expert testified that these regulations were deficient in almost every respect. There had been specific warnings to the Mayor and Chief of Police from various supervisory personnel in the police department as to the need for training. There was also an almost complete failure to check the background of prospective police officers. Although a local ordinance

required psychological evaluations, they were often not performed. There was also evidence of prior misconduct on the part of the department and evidence that these complaints were seldom investigated. The incident involved in the case was not investigated at all by the city for more than a year after the incident and then only long after the officers involved had been indicted.

In sharp contrast the evidence in the present case indicates that the City of Springdale has in place and has followed a regular system of investigating complaints of police misconduct and it also appears that there have been few such complaints. (Freland affidavit) In recruiting policemen, complete background checks are conducted including a psychological evaluation. (Osborn deposition pp. 39, 40) As the report of Chief Freland indicates, (Freland deposition Exh. 8) an investigation of the incident was immediately launched with all details being carefully examined. The police department rules are admittedly adequate. In fact General Order No. 46 (Freland affidavit) covering use of force, was distributed by the chief through a memo citing *Tennessee v. Garner*, 471 US 1 (1985).

The shooting of Brent Smith did not result from the actions of the entire night shift of the Springdale Police Department. Instead it resulted from the decision of one officer acting under extreme provocation in which he had at best a split second in which to make the decision to fire. Petitioner may disagree with Chief Freland's conclusion but she can find no case law holding that the chief's decision supports an inference of a de facto unconstitutional practice within the Springdale Police Department.

Petitioner equates Chief Freland's decision in this case with a failure to discipline. That is simply not the fact. While she naturally picks out the bits and pieces of evidence which would support the theory that Brent Smith was shot while only trying to escape, there is also evidence that he was trying to run over Officer Schulcz. The

shooting occurred directly in front of the home of Bob Maley who observed the incident through his front window. At 9:40 P.M. on the night of the shooting Maley gave a written statement (Maley deposition Exh. 1) in which he stated that:

> "Suspect backed up, went around the police car, tried to run down policeman."

Some fourteen months later, in January 1990, petitioner sent a private detective, one Gary Simpson, to visit Mr. Maley. (Maley deposition pp. 54, 55) At Simpson's urging, Maley retracted his conclusion as to Smith's intent. However, he did not retract his factual statement that Officer Schulcz was in front of the car when he took aim and that Smith was driving his car toward the officer. At page 26 of his deposition he testified as follows:

Q. Did you see the officer move at any time or take any steps to get out of the way of the Smith car?

A. Yes.

Q. Did it appear to you that he was trying to get out of the way of the Smith car?

A. That's what it appeared to me."

On page 56 he explained the effect of the change in his statement:

Q. Exhibit 1 is a statement that you gave on the night of the incident; is that right?

A. Yes, Exhibit 1 is. You know, like I said before, trying to run down policemen is something that when I looked at that I thought, Gee, I must be pretty smart or something if I know what the guy in the car is thinking or even assuming. I was just assuming, I guess, that he seen this policeman. I don't know, maybe he did or maybe he didn't, that's why I amended it.

Q. Did any police officer--

A. I'm not saying he didn't try to run down this policeman, all I'm saying is, I don't know if he even seen the policeman. I have no idea how to tell he seen him, I didn't see him wave to him or anything."

Again at page 72 of his deposition Maley testified:

Q. When you said in your second statement which is Exhibit No. 3, "I cannot honestly say suspect deliberately tried to run down policeman." I think you've indicated that you don't know what his intention was, is that what your saying?

A. That's all I'm saying is that I don't know what his intentions were. I'm not saying he didn't deliberately try to run down that policeman."

At page 77 Maley graphically described Schulcz's predicament:

Q. How long did he have to make this decision whether or not to shoot?

A. A split second, I guess."

Maley's version of the events completely corroborated Schulcz's testimony and it was also consistent with the analysis done by the engineer, Dr. Ronald Huston.

The testimony of the Beattys and the Laudermilks would tend to indicate that Officer Schulcz was not in danger from Smith's moving vehicle. However, it must be remembered that the Laudermilks live across the street from the incident and most of their view was blocked by the police cruiser. The Beattys live farther up the street from Maley and they were viewing the incident from a greater distance and a different angle than Maley. It is thus not difficult to understand why the chief would accept Maley's

initial statement even though it was not consistent with the version of the Beattys or the Laudermilks. In view of these facts and the extensive consideration which Chief Freland gave to the incident the conclusion formed by petitioner's expert Dr. Kirkham, at paragraph 9 of his affidavit is totally unsupported. In fact, this particular paragraph comes closer to being a legal conclusion than an expert opinion of fact. Chief Freland's obligation was to investigate the matter and give fair consideration to all of the evidence. While others might reach a different conclusion it is obvious that there were objective facts to support Chief Freland's conclusion that no disciplinary action was warranted. No reported decision has ever second guessed a police chief's good faith conclusion where it was based upon an adequate investigation.

Petitioner also argued that the city can be held liable because it ratified the shooting of Brent Smith by finding that disciplinary action was not warranted. The simple answer to this argument is that the ratification theory can have no application to cases claiming excessive use of force by police officers. The ratification theory can only apply to a situation where the unconstitutional action is approved and confirmed by a policy maker who has the power to reverse or repeal the act or decision. When Officer Schulcz pulled the trigger, any alleged violation of Smith's constitutional rights was complete and no power on earth could ratify, confirm or reverse the action. The term "ratify" is usually used in situations where some particular action of a subordinate, such as an ambassador signing a treaty, is subject to ratification by a higher authority such as the senate. In that case the action is not complete nor valid until the ratification takes place. No one can validate a shooting by ratification nor is the disciplinary action of the officer involved in anyway analogous. Petitioner's argument is somewhat similar to the saying that a jury has ratified a murder by finding the defendant not guilty.

Kibbe v. Springfield, 777 F. 2d 801 (1st Cir. 1985) (writ dismissed 107 S. Ct. 1114, 1987) rejected the ratification theory in a police shooting situation, page 809, note 7:

> "The [trial] court suggested that the city had ratified defendant Perry's action by clearing him and finding that he had acted in accordance with the police department's policies. We are unconvinced that a failure to discipline Perry or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy."

The cases cited by petitioner illustrate and confirm the above analysis. *Hammond v. County of Madera*, 859 F. 2d 797 (9th Cir. 1988) was a situation where a county official improperly took Indian lands for road purposes. Under state law, the County Board of Supervisors were required to approve the taking before it became effective which they ultimately did. Thus the county, which could have refused to approve the taking and return the lands, instead ratified it and accepted the property.

Melton v. Oklahoma City, 879 F. 2d 706 (10th Cir. 1989) involved a police officer who was allegedly fired for testifying on behalf of a criminal defendant. The decision to fire the officer was approved by the city manager who was the final policy making authority over employment decisions. His approval was considered a ratification since he had the power to disapprove and thereby reverse and avoid the unconstitutional firing.

Although both *Marchese v. Lucas*, 758 F. 2d 181 (6th Cir. 1985) and *Walker v. Norris*, 917 F. 2d 1449 (6th Cir. 1990) both discuss ratification, those cases actually stand for the proposition that the failure to investigate is evidence of a policy of condoning excessive use of force by police officers.

In *Walker* an inmate of a state prison was fatally stabbed by a fellow inmate in the presence of two guards who had ample opportunity to prevent the attack. The Court of Appels affirmed a judgment against the guards but upheld a directed verdict in favor of the state corrections

commissioner and the warden. In refusing to impose ratification liability the court noted at p. 1457:

> "Here, the prison's internal affairs division investigated the stabbing and prepared an incident report, which defendant Dalton reviewed and discussed with the associate warden before signing it and submitting it to district attorney and disciplinary board."

Even though no disciplinary action was taken against the guards the court held there was no basis for supervisory liability since the incident was investigated. In the present case the chief conducted a complete investigation and reached a conclusion (concurred in by a U.S. District Court Judge and the Court of Appeals) based upon objective evidence, that no disciplinary action was warranted under these circumstances. There simply is no basis for concluding that the city or the chief has a policy of condoning the use of excessive force.

Marchese v. Lucas, 758 F. 2d 181 (6th Cir. 1985) involved an assault on a prisoner in a county jail. The perpetrator was never identified but it was established that he was admitted to the plaintiff's cell by a deputy sheriff who unlocked the cell door with a key. The court viewed the use of the key as evidence of the participation of various shift personnel in the assault. In affirming a jury verdict against the county sheriff the court stated the real basis for the decision:

> "The sheriff's subsequent failure to order and direct an investigation which disclosed exactly who were the perpetrators of the brutal violations to the U.S. Constitution and to administer censure and punishment served to confirm the existence of an unstated "policy" of toleration of illegal brutality toward any county prisoner who had threatened the life of a sheriff's deputy".

There is obviously no factual parallel between *Marchese* and the present case.

II. Ohio Revised Code Sections 2744.02 and 2744.03 provide a city and its police chief with absolute immunity from state law wrongful death and survivorship claims arising from the shooting of a fleeing offender by a member of the police force.

In addition to the 1983 claim Petitioner has also attempted to plead a cause of action for wrongful death under Ohio Revised Code Section 2125.01 and a survivorship action under Revised Code Section 2305.21 for Smith's personal injuries and pain and suffering experienced prior to his death.

Revised Code Section 2744.02, effective November 20, 1985, provides the city with complete immunity from the state law claims:

> "(A)(1) For the purposes of this Chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in Division (B) of this Section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental....function."

Division B of the Section lists a number of exceptions where political subdivisions are liable but none remotely covers the circumstances of this case. Revised Code Section 2744.01 lists a number of "governmental functions" including:

> "The provision or non-provision of police, fire, emergency medical, ambulance, and rescue services or protection;"

Urseth v. Dayton, 653 F.Supp.1070 (S.D.Ohio 1986) held that the above quoted sections provided the city with complete immunity from liability for damages in a wrongful

death action arising from an excessive use of force by the police. The Court however declined to apply the statute since the incident occurred in 1983 prior to the effective date.

Chief Freland would have no liability to the petitioner on the merits of the case under state law since supervisory officials have no vicarious liability for the acts of their subordinates. He also is provided with immunity by Revised Code Section 2744.03 which provides in pertinent part as follows:

> "(VI) In addition to any immunity or defense referred to in Division (A)(7) of this Section and in circumstances not covered by that Division, the employee is immune from liability unless one of the following applies:
>
> (a) His acts were manifestly outside the scope of his employment or official responsibility;
> (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
> (c) Liability is expressly imposed upon the employee by a section of the revised code."

Obviously none of the listed exceptions has any application to the activities of Chief Freland in this case.

Petitioner argued that Chapter 2744 immunity is not absolute, citing *E.J. v. Hamilton Count*, 707 F. Supp. 314 (S.D. Ohio 1989). E.J. claimed physical and sexual abuse while an inmate of a county juvenile home. Hamilton County was not claiming immunity under 2744.02. It was instead claiming immunity under Section 2744.03(A)(5) which provides immunity for discretionary acts unless the discretion was exercised with "malicious purpose, in bad faith, or in a wanton or reckless manner." The decision was made in the overruling of a motion to dismiss under Rule 12(b)(6). As we might expect, counsel had quoted the

statute in alleging that the actions of the policy maker were taken with "malicious purpose, in bad faith, or in a wanton or reckless manner." The county in that case could not claim immunity under Section 2744.02 because Section 2744.02(B)(4) contains an exception for injuries occurring "within or on the grounds of buildings that are used in connection with a performance of a governmental function."

Wallin v. Cincinnati Eye Bank, et al, 733 F. Supp. 1152 (S.D. Ohio 1990) was a suit against Hamilton County and the county coroner for damages arising out of the erroneous statement that corneas collected from plaintiff's decedent for transplant purposes contained the AIDS virus. The court held that Section 2744.02 provided absolute immunity for Hamilton County since a governmental function was involved and no exception applied. The coroner was likewise found to be immune under Section 2744.03 since none of the exceptions were applicable.

In *Rahn v. City of Whitehall*, 62 Ohio App. 3d 62 (Franklin Co. 1989) the plaintiff was injured when a fleeing motorist collided with her car. Plaintiff claimed the police department had negligently conducted a high speed chase of the offending motorist. The court held that the city was absolutely immune under Ohio Revised Code Section 2744.02.

Chief Freland is entitled to immunity under 2744.03(A)(6) since none of the exceptions (a), (b) or (c) are applicable. Unquestionably the chief was acting within the scope of his employment. The plaintiff has not alleged in the complaint that the chief's actions were "with malicious purpose, in bad faith, or in a wanton or reckless manner". Moreover the factual matters submitted to the court on this motion for summary judgment would refute any such allegation were it made. Finally there is no code section expressly imposing liability.

Petitioner has also argued that "The Ohio Supreme Court has also determined Chapter 2744 immunity to be qualified", citing 1946 *St. Clair Corporation v. Cleveland*, 49

Ohio St. 3d 33 (1990). This is a complete distortion of the holding in that case. The case was a Section 1983 action filed in state court and there were no state law claims alleged. The plaintiff, the owner of a bar, alleged that a Cleveland Police Officer had been intentionally harassing his customers by illegally ticketing and towing their cars. He claimed that his lost business constituted a deprivation of property without due process of law under Section 1983. The Supreme Court applied the well known principle that in 1983 cases alleging only a deprivation of a property interest the plaintiff must plead the absence of a state law remedy. The Supreme Court affirmed the dismissal holding that Revised Code Section 2744.03(A)(6) does provide a state law remedy against the individual police officer for his intentional torts. The court did not hold that this section provided any remedy against the city itself or the police chief nor did it consider the question of qualified versus absolute immunity. It will be remembered that the plaintiff does not even allege an intentional tort on the part of Chief Freland.

Constitutional questions regarding immunity statutes were long ago disposed of in *Krause v. State of Ohio*, 31 Ohio St. 2d 132 (1972). While this holding predates Chapter 2744 it upholds the principle that suits on state law claims may be brought against the state and its political subdivisions only as authorized by state law. To the knowledge of this writer no Federal Court has ever held that governmental immunity from state law claims violates any provision of the United States Constitution. Indeed plaintiff apparently has been unable to find such a case.

Petitioner has also argued that 2744.02 would violate federal principles of equal protection. Again this argument has absolutely no substance. The statute creates no suspect classifications among claimants. All claimants are treated alike in that no claimant has a cause of action against a municipal corporation growing out of the operations of a police department. In construing a prior immunity statute contained in Chapter 2743 of the Revised Code, the Court

of Appeals for Franklin County in *Frazier v. Alum Crest*, 48 Ohio App 2d 283 (1976) rejected the equal protection argument even though both statutes waived governmental immunity in one circumstance and not in another. The court concluded that:

> "The extent to which the state wishes to waive sovereign immunity is a matter for the state to determine. The fact that the state waived in some circumstances and not others does not constitute a denial of the equal protection of the law."

III. Where a Plaintiff petitions for a Writ of Certiorari to review a judgment in favor of all Defendants but argues error only as to one Defendant, Certiorari, if granted, should be limited to that Defendant.

The petition for certiorari argues only the claims against Officer Peter Schulcz and makes no mention of any error as to the judgment in favor of Chief James Freland or the City of Springdale. Under these circumstances the petitioner must be deemed to have waived any claim of error as against the Police Chief or the city and the petition should be denied as to these parties.

CONCLUSION

Petitioner conceded that there is no basis for a claim of failure to train against either Chief Freland or the city. Petitioner's sole remaining claim is that the city and Chief Freland created an "atmosphere of lawlessness" by condoning the excessive use of force. There is of course no evidence of a single prior incident and all of the available evidence indicated exactly the contrary. The sole fact upon which petitioner rests her case is the fact that Chief Freland, following a thorough investigation, came to a conclusion which differs from that of the petitioner. The decisions of the courts below demonstrate that the chief's conclusion was not unreasonable. As a matter of law this is insufficient to support a 1983 claim on these facts. Both the city and Chief Freland are immune from the state law

claims under Revised Code Sections 2744.02 and 2744.03 and petitioner has presented no authority to the contrary. All of the constitutional arguments as to Chapter 2744 have been previously disposed of by the Courts of Ohio. The City of Springdale and Chief James Freland were entitled to summary judgment and certiorari should be denied as to these respondents.

Respectfully submitted,

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